Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-109 OF 1995 CONSOLIDATED WITH CIVIL APPEAL NOS W-02-107-1995 AND HEARD TOGETHER WITH W-02-448-1995
GOPAL SRI RAM, ABDUL MALEK AND AHMAD FAIRUZ JJCA
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Civil Procedure *— Representative action — Club members — Plaintiffs not public officers of club — Defendants were office bearers and members of protem committee of club at material times — Allegation that defendants breached fiduciary duties owed to club — Rights of plaintiffs as members of club affected — Whether plaintiffs had standing to bring action on behalf of club in representative capacity — Societies Act 1966 s 9(c)*

Unincorporated Associations *— Club — Promoters of club — Definition of promoters — Whether promoters stand in fiduciary capacity to club*

Unincorporated Associations *— Club — Promoters of club — Fiduciary duty — Whether promoters stand in fiduciary capacity to club — Whether duty breached — Whether any injury resulted — Whether relief asked for and given was proper*

Equity *— Fiduciary duty — General characteristics of fiduciary relationships — Whether any strict rules for determining whether relationship is fiduciary in nature — Whether to be decided on a case to case basis*

Contract *— Undue influence — Fiduciary relationship — Share acquisition agreement — No independent valuation of purchase price — Acquisition of shares in company owned by promoters of club — No disclosure of interests to club members — Whether agreement procured by exercise of undue influence — Whether promoters had abused confidence reposed in them as fiduciaries — Whether knowledge of promoters could be equated to that of company — Whether court entitled to pierce corporate veil — Contracts Act 1950 s 16*

Contract *— Undue influence — Relief — Whether rescission was the only appropriate remedy — Whether court of equity could grant relief to meet ends of justice — Contracts Act 1950 s 19(1) — Specific Relief Act 1950 s 34(1)*

In 1978, the first and second appellants, together with Ayala Group of Companies from the Philippines planned to incorporate a proprietary club in Malaysia. In 1979, they acquired all the shares of a company called Raintree Development Sdn Bhd ('RDB') which owned a piece of land that was identified as the proposed site of the clubhouse. In 1980, Allied Capital Sdn Bhd ('Allied') was incorporated to build the club's premises. The preponderance of the shares in RDB and Allied were, at all material times, held by the first and second appellant, who together with the fourth appellant, controlled the board of the two companies. In 1981, the shareholders of RDB sold their shares to Allied, and subsequently, RDB amended its

memorandum of association and enlarged its objects to include the carrying on of the business of a recreational club called 'The Raintree Club of Kuala Lumpur' ('the club'). On 9 May 1981, RDB entered into a contract with Allied, under which Allied was to build the club's premises for RM19m. On 21 October 1981, a protem committee of the club was elected. It comprised all the nine appellants, and the first and second appellants were appointed as the president and vice-president respectively. On 23 February 1982, the club obtained its temporary certificate of registration. Following that, a membership committee which comprised the third, fourth, fifth, eighth and ninth appellants were appointed, and the committee subsequently passed a resolution to grant provisional admission to membership of the club to about 300 persons, which included the appellants ('the provisional members'). On 3 June 1982, the protem committee met again and passed a resolution which authorized the first and second appellants to enter into a sale and purchase agreement on behalf of the club under which the entire issued and paid up capital of RDB was to be purchased by the club from Allied for RM47m ('the share acquisition agreement'). The purpose was to acquire the building and the facilities for the club. The shares were to be resold to applicants who applied for membership. The first extraordinary general meeting ('the EGM') unanimously resolved that the share acquisition agreement be entered into, and that it be executed by the first and second appellants on behalf of the club. These were subsequently carried out. The provisional members, except the appellants, who were to ultimately bear the RM47m, were not invited to attend the EGM. Upon the issuance of the club's final certificate of registration as a society on 20 January 1983, members of the protem committee became members of the general committee, and some of the provisional members became full members. The club's members were then informed by the general committee that the total cost of acquiring the club's premises from Allied was much more than the RM47m, due to additional costs. Dissatisfied, members of the club appointed an ad hoc committee to study the share acquisition agreement at the club's first annual general meeting. The committee produced a report which was highly critical of the appellants, who later resigned as members of the general committee.

The members of the club ('the respondents') brought a representative action against the appellants in the High Court for damages for breach of fiduciary duty as promoters of the club in respect of the share acquisition agreement (see [1995] 2 MLJ 1). The appellants, however, argued that the respondents were incompetent in law to bring a representative action as they were not and had never been public officers of the club within the meaning of s 9(c) of the Societies Act 1966. The appellants further argued that promoters of a club have no fiduciary relationship with the members of the club they sought to promote. They contended that, in any event, there was no identifiable class to whom the fiduciary duty was owed, as the respondents were only provisional members at the

material times. The trial judge, however, found that the action was properly instituted, and that the appellants had acted in breach of the fiduciary duty owed by them to the respondents. The judge then proceeded to enter judgment against the appellants with damages to be assessed. The appellants appealed ('the first appeal').

Meanwhile, on 24 April 1986, Allied brought a separate action against the club ('the respondents') to recover what it said was due to it under the share acquisition agreement, which amounted to RM8,409,997 plus interest (see [1995] 2 MLJ 1). In their defence, the respondents resisted the action on the ground that the agreement had been procured by undue influence, as the first and second appellants were the major shareholders of Allied and RDB at all material times. The respondents counterclaimed and asked for a refund from Allied of the difference between RM47m and the sum which they claimed as being the fair value of the shares. In its counterclaim, Allied pleaded for rescission of the share acquisition agreement. The respondents resisted Allied's counterclaim on the basis that adjustment of the price, and not rescission, was the appropriate remedy in the circumstances of the present case, as the object sought to be achieved was disgorgement by Allied of money which it was not entitled to keep. The trial judge decided in favour of the respondents. Allied appealed ('the second appeal') and submitted, inter alia, that: (i) the existence of fiduciary relationship as declared by the judge between the appellants and the respondent did not extend to Allied, as Allied was a separate corporate personality; (ii) the respondents could either accept the agreement which was tainted with undue influence with all its benefits and burdens, or gave it up and returned to status quo ante through the process of restitutio in integrum; but, they were not entitled to affirm the agreement and to obtain adjustment of the price at the same time; and (iii) the orders made by the judge in the two actions amounted to double recovery in the respondents' favour.

The respondents filed a cross-appeal in the second appeal on the grounds that: (i) the judge had awarded them only the costs of the counterclaim, and not the costs of Allied's action; (ii) the judge awarded interest only from the date of judgment and not from the date of the writ.

The third appeal before the Court of Appeal was by Allied against the order of the High Court which directed Allied to pay the sum awarded against it into court as a condition for granting a stay pending appeal. As the Court of Appeal required time to consider the first and second appeals, which were substantive appeals, the court decided that there ought to be an unconditional stay pending its decision. The third appeal was thus allowed, and the deposit paid into court was refunded to Allied.

Held, dismissing the first and second appeals, allowing the cross-appeal in part, and setting aside the stay of execution granted in the third appeal:

(1) It would be a travesty of justice to say that the only way to bring an action against the appellants in the first appeal was by suing in the name of the club's public officer, bearing in mind that: (i) the action was instituted against the appellants who were, at the material time, purporting to act in their capacity as as office bearers and members of the protem committee of the club for breaching the fiduciary duties that they owed to the club; and (ii) the members of the club were the ultimate victims of any wrongdoing of the appellants. It followed that the procedural device of a representative action was appropriate in this case (see p 289F–I); *Ong Boon Seong v Syed Hussein Alatas* [1971] 2 MLJ 218 followed.

(2) The trial judge was correct in holding that the appellants were promoters of the club, and that the fiduciary doctrine was applicable to promoters of proprietary clubs (see p 292A).

(3) Equity has, in keeping with the purpose of its origin, refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity (see p 294D); *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382 followed.

(4) Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function (see p 295C–D).

(5) The instant case was merely an illustration of equitable protection being extended to fiduciary undertakings by analogy with well-established fiduciary relationships. The trial judge's conclusion that the appellants as promoters were fiduciaries, was a correct direction in law and was entirely in keeping with the spirit and intendment of equity jurisprudence. The factual analysis of the judge further supported the inclusion of promoters of a club within the scope of the fiduciary doctrine (see pp 300F and 301A–B).

(6) Where a fiduciary duty is owed to an identifiable class of persons, it is the class to whom the law directs its attention. In the present case, that class comprised all those persons who had applied for and were awaiting admission to membership of the club. Although some of them might not join the club later, and others might take their place, the class did not lose its identity (see p 302E).

(7) The trial judge had correctly concluded that the appellants had acted in breach of the duty owed by them. It was clear that the interests of the respondents were in conflict with the financial interests of the appellants. It was in the respondents' interests that the purchase price be kept as low as possible, but the appellants, who were connected to Allied or RDB in one way or another, were there to ensure that Allied reaped the highest possible profit. However, the appellants had failed to disclose their financial interests in Allied to the respondents. Further, the appellants' opinion that the purchase price of RM47m was fair and reasonable was not supported by any independent valuation. Any protestation by the appellants that they acted honestly and in good faith having the best interests of the club at heart was quite useless, for neither dishonesty nor bad faith was a necessary ingredient of the alleged wrongdoing (see p 303G–I– 307); *Gluckstein v Barnes* (1900) AC 240 followed.

(8) Our courts, when faced with a case of undue influence in the sphere of the law of contract, must ultimately have regard to the words of our own statute, although decisions of courts of those jurisdictions where the law is akin to our own may be referred (see p 309E).

(9) Undue influence, like all other equitable doctrines, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. It is important to apply the doctrine, as housed in s 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. In the absence of any intention on the part of Parliament to alter the doctrine, s 16, being a remedial provision, should be interpreted in a broad and liberal fashion. Even in cases which are not stricto sensu contractual in nature, the section may be resorted to by analogy (see p 310F).

(10) The proof of dominance of the will of a party to a transaction by the other party to the transaction is not a *sine qua non* of the doctrine of undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed (see pp 314I and 315A); *Tufton v Sperni* [1952] 2 TLR 516 followed.

(11) The trial judge's conclusion that Allied had obtained an advantage through undue influence may be founded upon the general rules of attribution. The specific findings of the judge that the first and second appellants had abused the confidence reposed in them as fiduciaries were to be equated to an abuse of confidence by Allied. The relationship between the first and second appellants and Allied was such that their knowledge may be safely said to be that of Allied. The first and second

appellants were also Allied's alter ego, so that the corporate facade may be pierced to reveal the true picture (see p 318D–G); *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918

(12) A plaintiff who proves a case of breach of trust or of fiduciary relationship is entitled to a wide range of relief, such as an account of profits, the appointment of receiver to recover money due to him, or damages. The appropriateness of the particular remedy depends very much upon the facts of each case (see p 321H); *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209 followed.

(13) It is axiomatic that the statement of a view upon the value of a property is an expression of opinion, and it is open to the trier of fact in the justice system to accept the opinion of one witness upon the value of a thing in preference to the opinion of another. In this case, the judge in the second appeal preferred the valuation tendered in evidence by the respondents, and this was something that was within his province (see pp 321I and 322A–C).

(14) Pursuant to s 19(1) of the Contracts Act 1950 and s 34(1) of the Specific Relief Act 1950, the usual remedy by which an innocent party may relieve himself of all his obligations under a contract procured by undue influence is rescission (see p 323B–E).

(15) The Specific Relief Act 1950, however, does not prohibit against the grant of other kinds of relief to a party who seeks to remedy a wrong perpetrated upon him by another in consequence of exerting undue influence in the wider sense which existed in this case (see p 324A–B).

(16) The maxim of the law is *ubi jus ibi remedium*. Accordingly, if a wrong is found to have occurred in circumstances which disclose an abuse of confidence in respect of which a court of equity may grant relief, it is open to the court to grant such relief as would meet the ends of justice. In this case, to demand that rescission be the sole remedy would cause grave injustice, and would denude equity jurisprudence of its flexibility (see p 324B–D); *Gluckstein v Barnes* (1900) AC 240 and *Dusik v Newton* (1985) 58 ER 157 followed.

(17) The purpose of equity, which is to ensure disgorgement by a wrongdoer who has profited through an abuse of confidence, was achieved by getting Allied to return to the club, the difference between RM47m and the fair price of the shares, as ordered by the judge. An award of damages in a case where rescission is unavailable also accords with general principles of unjust enrichment (see p 326F–G); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; [1942] 2 All ER 122 followed.

(18) The two awards given by the trial judge in the first and the second appeals were not for double enforcement, but for recovery of the actual loss suffered by the respondents. The respondents might obtain only nominal damages against the appellants if they recovered the full sum awarded against Allied. Further, the respondents might not recover anything from Allied, and in that event, they would have to look to the appellants in the first appeal for satisfaction of the judgment. Pursuant to the control a court exercises over all its orders, there would be no double recovery (see p 326H–I).

(19) Although the power to award costs is discretionary, it must be exercised judicially. The general rule is that a successful litigant must have all his costs unless he has done something or omitted to do something in the conduct of the action by reason of which he should be deprived of his costs. A judge when departing from the general rule must give reasons. However, the trial judge in this case had failed to do so. It followed that this court was entitled to exercise its original discretion, and the respondents would therefore have the costs of the action as well (see p 327E).

(20) It was a matter of pure discretion for the judge whether to award interest to the respondents from the date of judgment or the date of the writ. Thus, there was no merit in this part of the cross-appeal (see p 327F).

Per curiam

Where a transaction is tainted by undue influence, it is not only invalid as between the parties thereto and their privies, but also as against any other person who seeks to enforce the transaction with knowledge or notice, actual or constructive, that it was procured by undue influence or other any other vitiating element. A third party may safely take under such a transaction and enforce it only if he is a bona fide purchaser for value without notice of the invalidating circumstances. The doctrine of the bona fide purchaser for value without notice finds expression, in the context of the specific enforcement of contracts, in s 26(b) of the Specific Relief Act 1950 (see p 315B–D).

[Bahasa Malaysia summary

Dalam tahun 1978, perayu pertama dan kedua, bersama-sama dengan Ayala Group of Companies dari Filipina telah bercadang untuk memperbadankan suatu kelab empunya di Malaysia. Dalam tahun 1979, mereka telah membeli kesemua syer sebuah syarikat yang dipanggil Raintree Development Sdn Bhd ('RDB') yang merupakan tuan punya sebidang tanah yang mereka telah mengenalpasti sebagai tapak kelab. Dalam tahun 1980, Allied Capital Sdn Bhd ('Allied') telah diperbadankan untuk tujuan pembinaan premis kelab.

Kebanyakan syer dalam RDB dan Allied adalah, pada semua masa material, dipegang oleh perayu pertama dan kedua, yang bersama dengan perayu keempat, menguasai badan pengarah kedua-dua syarikat tersebut. Dalam tahun 1981, pemegang syer RDB telah menjual syer mereka kepada Allied, dan selepas itu, RDB telah meminda memorandum persatuannya dan memperluaskan objeknya untuk merangkumi perjalanan perniagaan sebuah kelab rekreasi yang dipanggil 'The Raintree Club of Kuala Lumpur' ('kelab tersebut'). Pada 9 Mei 1981, RDB telah mengikat suatu kontrak dengan Allied, di mana Allied akan membangunkan premis kelab untuk RM19 juta. Pada 21 Oktober 1981, suatu jawatankuasa protem kelab tersebut telah dilantik. Ia terdiri daripada kesemua sembilan perayu, dan perayu pertama dan kedua dilantik sebagai presiden and naib-presiden. Pada 23 Februari 1982, kelab tersebut telah mendapat suatu sijil pendaftaran sementaranya. Ekoran itu, suatu jawatankuasa keahlian yang terdiri daripada perayu ketiga, keempat, kelima, kelapan dan kesembilan telah dilantik, dan ia telah menandatangani ketetapan untuk membenarkan kemasukan keahlian sementara kelab tersebut kepada kira-kira 300 orang, termasuk perayu. Pada 3 Jun 1982, jawatankuasa protem berjumpa lagi dan ia meluluskan suatu ketetapan yang memberi kuasa kepada perayu pertama dan kedua untuk mengikat perjanjian jual beli bagi pihak kelab tersebut, dimana seluruh modal RDB yang telah dikeluarkan dan telah dibayar akan dibeli oleh kelab tersebut daripada Allied untuk RM47m ('perjanjian pembelian syer tersebut'). Tujuannya ialah untuk mendapatkan bangunan dan kemudahan untuk kelab. Syer yang berkenaan adalah untuk dijual semula kepada pemohon keahlian. Mesyuarat agung luar biasa yang pertama ('EGM') telah secara sebulat suara menetapkan bahawa perjanjian pembelian syer tersebut akan diikat, dan perayu pertama dan kedua akan menyempurnakannya bagi pihak kelab. Ini telah dijalankan kemudiannya. Ahli-ahli sementara, kecuali perayu, yang akhirnya akan menanggung RM47m tersebut tidak djemput untuk menghadiri EGM. Apabila sijil pendaftaran muktamad kelab tersebut sebagai sebuah persatuan telah dikeluarkan pada 20 Januari 1983, ahli jawatankuasa protem telah menjadi jawatankuasa agung, dan sebahagian daripada ahli-ahli sementara telah menjadi ahli penuh. Ahli kelab kemudiannya telah dimaklumkan oleh jawatankuasa agung bahawa jumlah kos untuk membeli premis kelab daripada Allied adalah jauh lebih daripada RM47m, akibat kos tambahan. Ahli-ahli kelab tidak berpuas hati, lalu mereka telah melantik seuatu jawatankuasa ad hoc untuk mengkaji perjanjian pembelian syer tersebut pada mesyuarat agung tahunan yang pertama. Jawatankuasa tersebut telah mengemukakan suatu laporan yang amat kritikal tentang perayu, yang kemudiannya telah meletak jawatan sebagai ahli jawatankuasa agaung.

Ahli-ahli kelab ('penentang') telah membawa suatu tindakan perwakilan terhadap perayu untuk ganti rugi akibat kemungkiran kewajipan fidusiari sebagai promoter kelab, berkenaan dengan

perjanjian pembelian syer tersebut (lihat [1995] 2 MLJ 1). Walau bagaimanapun, perayu berhujah bahawa penentang adalah tak kompeten dari segi undang-undang untuk membawa suatu tindakan perwakilan kerana mereka bukan dan tidak pernah menjadi pegawai am kelab tersebut dalam maksud s 9(c) Akta Persatuan 1966. Perayu berhujah bahawa promoter kelab tidak mempunyai perhubungan fidusiari dengan ahli kelab yang mereka menganjur. Mereka mengatakan, walau bagaimanapun, tidak terdapat kelas di mana kewajipan fidusiari ditujukan kerana penentang hanya merupakan ahli sementara pada masa yang material. Tetapi, hakim perbicaraan mendapati bahawa tindakan tersebut adalah dimulakan dengan betulnya, dan bahawa perayu telah memungkiri kewajipan fidusiari mereka terhadap penentang. Hakim seterusnya memasukkan penghakiman terhadap perayu dengan ganti rugi untuk ditaksir. Perayu membuat rayuan ('rayuan pertama').

Sementara itu, pada 24 April 1986, Allied telah membawa suatu tindakan yang berasingan terhadap kelab tersebut ('penentang') untuk mendapat kembali apa yang perlu dibayar kepadanya di bawah perjanjian pembelian syer tersebut, yang berjumlah RM8,409,997 bersama dengan faedah (lihat [1995] 2 MLJ 1). Dalam pembelaan mereka, penentang menentang tindakan tersebut atas alasan bahawa perjanjian tersebut telah dibuat secara pengaruh tak wajar, oleh kerana perayu pertama dan kedua merupakan pemegang syer pertama dan kedua yang utama bagi Allied dan RDB pada semua masa yang material. Penentang menuntut balas dan meminta pengembalian perbezaan antara RM47m dan jumlah yang mereka tuntut sebagai nilai munasabah syer daripada Allied. Allied kemudiannya telah memohon untuk pembatalan perjanjian pembelian syer tersebut dalam tuntutan balasnya. Penentang menentang tuntutan balas Allied atas dasar bahawa penyelarasan harga, dan bukannya pembatalan, merupakan remedi yang wajar dalam keadaan kes ini kerana tujuan yang ingin dicapai ialah pengembalian wang yang Allied tidak berhak untuk simpan, oleh Allied. Hakim perbicaraan membuat keputusan yang memihak kepada penentang. Allied merayu ('rayuan kedua'), dan ia mengatakan, antara lain, bahawa: (i) kewujudan perhubungan fidusiari antara perayu dan penentang sepertimana yang telah diisytiharkan oleh hakim tidak melibatkan Allied, yang merupakan personaliti korporat; (ii) penentang boleh, sama ada menerima perjanjian yang tercemar dengan pengaruh tak wajar dengan kesemua faedah dan tanggungannya, atau menolaknya dan kembali kepada status quo ante melalui restitutio in integrum; tetapi mereka tidak berhak mengesahkan perjanjian tersebut dan mendapatkan penyelarasan harga pada masa yang sama; dan (iii) perintah yang dibuat oleh hakim dalam dua tindakan tersebut menyebabkan penentang mendapat kembali dua kali ganda.

Penentang telah memfailkan suatu rayuan balas dalam rayuan kedua atas alasan bahawa: (i) hakim telah mengaward mereka hanya kos tuntutan balas, dan bukan kos tindakan Allied; (ii) hakim hanya

mengaward faedah daripada tarikh penghakiman sahaja, dan bukan dari tarikh writ. A

Rayuan ketiga di Mahkamah Rayuan adalah oleh Allied terhadap perintah Mahkamah Tinggi yang mengarahkan Allied untuk membayar jumlah yang diaward terhadapnya ke dalam mahkamah sebagai syarat untuk membenarkan penggantungan sementara menunggu rayuan. Oleh kerana Mahkamah Rayuan memerlukan masa untuk mempertimbangkan rayuan pertama dan kedua, yang merupakan rayuan substantif, mahkamah memutuskan bahawa harus terdapat penggantungan tak bersyarat sementara menunggu keputusannya. Lantaran itu, rayuan ketiga ini dibenarkan, dan deposit yang dibayar ke mahkamah telah dikembalikan kepada Allied. B C

Diputuskan, menolak rayuan pertama dan kedua, membenarkan sebahagian rayuan balas, dan membatalkan penggantungan pelaksanaan yang telah diberikan dalam rayuan ketiga: D

(1) Adalah merupakan suatu persendaan keadilan untuk mengatakan bahawa cara tunggal untuk membawa suatu tindakan terhadap perayu dalam rayuan pertama ialah dengan menggunakan nama pegawai am kelab, kerana: (i) tindakan tersebut telah dimulakan terhadap perayu yang, pada masa material itu, bertindak dalam kapasiti mereka sebagai pemegang jawatan dan ahli jawatankuasa protem kelab untuk kemungkiran kewajipan fidusiari mereka terhadap kelab; dan (ii) ahli kelab merupakan mangsa akhir akibat sebarang salah laku oleh perayu. Jadi, perinti procedur tindakan perwakilan adalah wajar dalam kes ini (lihat ms 289F–I). E F

(2) Hakim perbicaraan adalah betul dalam memutuskan bahawa perayu adalah promoter kelab, dan bahawa doktrin fidusiari adalah terpakai terhadap promoter kelab empunya (lihat ms 292A).

(3) Ekuiti, mengikut tujuan asalnya, mengelak daripada menetapkan sebarang peraturan yang ketat untuk menentukan sama ada suatu perhubungan yang khusus mempunyai ciri-ciri fidusiari atau membangkitkan kewajipan fidusiari, dan ini menyebabkan jurisprudens ekuiti berkembang berdasarkan fakta suatu kes ke kes yang lain. Maxim 'kategori hubungan fidusiari tidak akan tutup' mengambarkan contoh pendekatan yang mahkamah ekuiti gunakan dalam kawasan aktiviti manusia ini (lihat ms 294D); *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382 diikut. G H

(4) Sama ada kewajipan fidusiari wujud atau tidak dalam suatu set keadaan yang khusus merupakan suatu soalan dasar kehakiman. Ia bergantung kepada kebenaran taraf perdagangan, dan dengan itu, mahkamah suatu bidang kuasa yang khusus boleh memilih sama ada untuk mengenakan kewajipan tersebut terhadap pihak- I

pihak dalam suatu urusniaga atau tidak, selepas mempertimbangkan latar belakang dan keadaan masyarakat di mana mereka berfungsi (lihat ms 295C–D).

(5) Kes ini hanya merupakan suatu contoh di mana perlindungan ekuiti telah dilanjutkan kepada kewajipan fidusiari secara analogi dengan perhubungan fidusiari yang telah mantap. Keputusan hakim perbicaraan bahawa perayu sebagai promoter adalah fidusiari ialah dalam arah undang-undang yang betul dan adalah sejajar dengan semangat dan tujuan jurisprudens ekuiti (lihat ms 300F dan 301A–B).

(6) Di mana kewajipan fidusiari adalah terhadap suatu kelas orang yang boleh dicam, kelas itulah yang undang-undang tujukan perhatiannya. Dalam kes ini, kelas tersebut terdiri daripada kesemua yang telah memohon untuk dan sedang menanti kemasukan keahlian kelab. Walaupun setengah daripada mereka yang berada dalam senarai ahli sementara mungkin tidak dapat menyertai kelab dan orang lain mungkin mengambil tempat mereka kemudian, identiti kelas tersebut tidak hilang (lihat ms 302E).

(7) Hakim perbicaraan adalah betul dalam memutuskan bahawa perayu telah memungkiri kewajipan mereka. Adalah jelas bahawa kepentingan penentang adalah bercanggahan dengan kepentingan kewangan perayu. Adalah merupakan kepentingan penentang supaya harga belian dikekalkan seberapa rendah yang mungkin, tetapi, perayu, yang mempunyai hubungan dengan Allied atau RDB dalam satu cara atau yang lain akan menentukan supaya keuntungan tertinggi yang mungkin akan didapat oleh Allied. Pendapat perayu bahawa harga belian RM47m adalah adil dan munasabah adalah tidak disokong oleh pentaksiran bebas. Sebarang bangkangan perayu bahawa mereka telah bertindak secara jujur dan dengan suci hati adalah tidak berguna, kerana ketidakjujuran atau niat jahat bukan merupakan ciri wajar salah laku yang dikatakan itu (lihat ms 303G–I– 307); *Gluckstein v Barnes* (1900) AC 240 diikut.

(8) Mahkamah kita, apabila menghadapi kes pengaruh tak wajar dalam kawasan undang-undang kontrak, harus mengambil kira perkataan statut kita sendiri pada akhirnya, walaupun keputusan mahkamah di bidang kuasa yang undang-undang tersebut adalah sama boleh dirujuk (lihat ms 309E).

(9) Pengaruh tak wajar, seperti doktrin ekuiti yang lain, adalah suatu konsep yang amat fleksibel. Tertakluk kepada pertimbangan dasar, kategori di mana ia boleh berfungsi adalah tidak tutup. Adalah penting untuk menggunakan doktrin tersebut, seperti yang dikandungi oleh s 16 Akta Kontrak 1950, kepada corak fakta yang berlainan secara fleksibel. Dalam ketiadaan sebarang niat pada pihak Parlimen untuk mengubah doktrin tersebut, s 16, sebagai suatu peruntukan remedial, harus ditafsirkan secara longgar dan liberal. Walaupun dalam

kes yang bukan bercirikan kontraktual stricto senso, seksyen tersebut boleh dirujuk secara analogi (lihat ms 310F). A

(10) Bukti penguasaan kebebasan bertindak suatu pihak dalam suatu urusniaga oleh pihak yang satu lagi bukan *sine qua non* dengan doktrin pengaruh tak wajar. Doktrin tersebut adalah terpakai dengan kekuatan yang sama jika daripada fakta yang telah B dibuktikan atau telah diakui, terdapat suatu perhubungan keyakinan dan suatu penyalahgunaan keyakinan oleh orang yang keyakinan tersebut diletakkan (lihat ms 314I dan 315A).

(11) Keputusan hakim perbicaraan bahawa Allied telah mendapatkan suatu kelebihan melalui pengaruh tak wajar boleh didasarkan C kepada peraturan am penyifatan ('attribution'). Pencarian spesifik hakim bahawa perayu pertama dan kedua telah menyalahgunakan keyakinan yang diletakkan ke atas mereka sebagai fidusiari harus disamakan dengan penyalahgunaan keyakinan oleh Allied. Perhubungan antara perayu pertama D dan kedua dan Allied adalah sedemikian sehingga pengetahuan mereka boleh dikatakan sebagai pengetahuan Allied dengan selamatnya. Perayu pertama dan kedua juga merupakan Allied, dan dengan itu topeng korporat boleh ditusuk untuk memperlihatkan keadaan yang sebenar (lihat ms 318D–G); *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant* E *Workers & Anor* [1980] 1 MLJ 109 dan *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 diikut.

(12) Seorang plaintif yang telah membuktikan suatu kes pecah amanah atau perhubungan fidusiari adalah berhak kepada F berbagai-bagai relief, seperti pemerian keuntungan, perlantikan penerima untuk mendapat kembali wang yang dihutang kepadanya, atau ganti rugi. Sama ada remedi yang tertentu tersebut sesuai atau tidak amat bergantung kepada fakta kes yang terlibat (lihat ms 321H); *Avel Consultants Sdn Bhd &* G *Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209 diikut.

(13) Adalah tidak dapat disangkalkan bahawa suatu pandangan yang dinyatakan tentang nilai suatu harta adalah suatu penyataan pendapat, dan adalah terbuka kepada pembicara fakta dalam sistem keadilan untuk menerima pendapat seorang H saksi tentang nilai sesuatu benda berbanding dengan pendapat yang satu lagi. Dalam kes ini, hakim mengutamakan penilaian yang dikemukakan sebagi keterangan oleh penentang, dan ini adalah seautu yang berada dalam bidang kuasa hakim (lihat ms 321I dan 322A–C); *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209 diikut. I

(14) Menurut s 19(1) Akta Kontrak 1950 dan s 34(1) Akta Relief Spesifik 1950, remedi biasa di mana suatu pihak yang tidak bersalah boleh melegakan diri sendirinya terhadap kesemua

tanggungjawabnya di bawah suatu kontrak yang didapat secara pengaruh tak wajar ialah pembatalan (lihat ms 323B–E).

(15) Walau bagaimanapun, Akta Relief Spesifik 1950 tidak menghalang pemberian lain bentuk relief kepada suatu pihak yang ingin membetulkan suatu kesalahan yang dilakukan ke atasnya oleh seorang yang lain dengan mengenakan pengaruh tak wajar dalam maksud yang lebih lebar yang telah yang wujud dalam kes ini (lihat ms 324A–B).

(16) Maxim undang-undang ialah *ubi jus ibi remedium*. Ekoran itu, jika suatu salah laku didapati telah berlaku dalam keadaan yang mendedahkan suatu penyalahgunaan keyakinan yang suatu mahkamah ekuiti boleh memberikan relief, adalah terbuka kepada mahkamah untuk memberikan relief yang berkenaan yang boleh mencapai keadilan. Dalam kes ini, tuntutan supaya pembatalan merupakan remedi tunggal akan menyebabkan ketidakadilan yang serius dan akan menjejaskan unsur fleksibel jurisprudens ekuiti (lihat ms 324B–D); *Gluckstein v Barnes* (1900) AC 240 dan *Dusik v Newton* (1985) 58 ER 157 diikut.

(17) Tujuan ekuiti untuk memastikan penyerahan kembali oleh orang yang bersalah yang telah mendapat keuntungan melalui suatu penyalahgunaan keyakinan telah dicapai dengan mengarahkan Allied untuk mengembalikan kelab tersebut, perbezaan antara RM47 juta dan harga syer yang berpatutan, seperti yang telah diarahkan oleh hakim. Suatu award ganti rugi dalam suatu kes di mana pembatalan tidak boleh diberikan adalah juga sejajar dengan prinsip pengayaan tak patut (lihat ms 326F–G); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; [1942] 2 All ER 122 diikut.

(18) Kedua-dua award yang telah diberikan oleh hakim perbicaraan dalam rayuan pertama dan kedua bukan untuk penguatkuasaan dua kali ganda, tetapi untuk mendapat kembali kerugian sebenar yang dialami oleh penentang. Penentang mungkin hanya mendapat ganti rugi nominal terhadap perayu jika mereka mendapat kembali jumlah penuh yang telah diawardkan terhadap Allied. Lagipun, penentang mungkin tidak akan mendapat kembali apa-apapun daripada Allied, dan dalam keadaan itu, mereka akan bergantung kepada perayu dalam rayuan pertama untuk penyelesaian penghakiman. Mengikut kawalan yang dijalankan oleh mahkamah terhadap kesemua perintahnya, tidak akan terjadinya mendapat kembali dua kali ganda (lihat ms 326H–I).

(19) Walaupun kuasa untuk mengaward kos adalah kuasa budi bicara, ia harus dilaksanakan mengikut kuasa kehakiman. Mengikut peraturan am, seorang litigan yang berjaya akan mendapat kesemua kos, melainkan jika dia telah membuat sesuatu atau tidak melakukan sesuatu dalam perjalanan tindakan yang mengakibatkannya kehilangan kosnya. Jika seorang hakim

tidak mengikut peraturan am, beliau harus memberikan sebab. Walau bagaimanapun, hakim perbicaraan dalam kes ini telah gagal untuk berbuat demikian. Ekoran itu, mahkamah ini adalah berhak untuk melaksanakan budi bicara asalnya, dan oleh yang demikian, penentang akan mendapat kos tindakan juga (lihat ms 327E).

(20) Sama ada hakim mengaward faedah kepada penentang dari tarikh penghakiman atau tarikh writ adalah suatu perkara yang bergantung kepada budi bicara hakim pada keseluruhannya. Oleh itu, tidak terdapat merit dalam bahagian rayuan balas ini (lihat ms 327F).

Per curiam

Apabila suatu urusniaga adalah dicemar oleh pengaruh tak wajar, ia bukan sahaja tidak sah antara pihak-pihak yang terlibat dan privi mereka, tetapi juga terhadap sesiapa yang ingin menguatkuasa urusniaga dengan pengetahuan atau notis, sebenar atau konstruktif, bahawa ia adalah didapati secara pengaruh tak wajar atau unsur perosak yang lain. Suatu pihak ketiga boleh dengan selamatnya memasuki urusniaga sedemikian dan menguatkuasanya hanya jika dia merupakan seorang pembeli bona fide purchaser untuk nilai tanpa notis keadaan yang menyebabkan ketaksahan tersebut. Doktrin pembeli nilai tanpa notis dikandungi dalam konteks penguatkuasaan spesifik kontrak, dalam s 26(b) Akta Relief Spesifik 1950 (lihat ms 315B–D).

[*Editorial Note*: The appellants in Civil Appeal Nos W–02–109–95 (the first appeal) and W–02–107–95 (the second appeal) have filed applications for leave to appeal to the Federal Court vide Civil Appeal Nos 08–34–96(W) and 08–32–96(W) respectively.]

Notes

For cases on undue influence in contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2281–2290.

For cases on membership of societies and clubs, see 12 *Mallal's Digest* (4th Ed) paras 1204–1208; [1992] Mallal's Digest 1724–1727; [1993] Mallal's Digest 1352–1356.

For cases on representative actions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2889–2890.

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AG v Goddard (1929) 98 LJKB 743*Aberdeen Railway Co v Blaikie Bros* [1854] 1 Macq 461

Allcard v Skinner [1887] 36 Ch D 145

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209

Barclays Bank plc v O'Brien & Anor [1993] 4 All ER 417

Bray v Ford [1896] AC 44

A *Boulting & Anor v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606
Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3d) 371
CIBC Mortgages plc v Pitt & Anor [1994] 4 All ER 433
Coleman v Myers [1977] 2 NZLR 225
B *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43
Consul Development Pty Ltd v DPC Estate Pty Ltd (1975) 132 CLR 373
Coomber v Coomber, Re Coomber [1911] 1 Ch 723
DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852
C *Dowsett v Reid* (1912) 15 CLR 695
Dusik v Newton (1985) 62 BCLR 1
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English v Dedham Vale Properties Ltd [1978] 1 All ER 382
Erlanger v The New Sombrero Phosphate Co (1878) AC 1218
D *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32
Frame v Smith (1987) 42 DLR (4th) 81
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Hospital Products Ltd v United States Surgical Corp & Ors (1984) 156 CLR 41
E *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109
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F 1995) (unreported)
Jirna Ltd v Mister Donut of Canada Ltd [1971] 22 DLR (3d) 639
Jones v Bouffier (1911) 12 CLR 579
Junkin v Junkin (1978) 20 OR (2d) 118
Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958) 100 CLR 342
G *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326
Lydney & Wigpool Iron Ore Co v Bird (1886) 33 Ch D 85
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H *Mohd Latiff bin Shah Mohd v Tengku Abdullah ibni Sultan Abu Bakar* [1995] 2 MLJ 1
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Treadwell v Martin (1976) 67 DLR (3d) 493
Tufton v Sperni [1952] 2 TLR 516
Twycross v Grant (1877) 2 CPD 469

Legislation referred to

Contracts Act 1950 ss 16, 19(1)
Securities Industry Act 1983
Societies Act 1966 s 9(c)
Specific Relief Act 1950 ss 2, 26(b), 34

Appeal from: Civil Suit Nos C22–204–86 and C23–1084–86 (High Court, Kuala Lumpur)

K Anantham (*Wong Chee Lin* with him) (*Skrine & Co*) for the appellants in Civil Appeal Nos W–02–107–95 and W–02–448–95 (the second and the third appeals).

Cecil Abraham (*RS Nathan* with him) (*Shearn Delamore & Co*) for the appellants in Civil Appeal No W–02–109–95 (the first appeal).

Raja Aziz Addruse (*Benjamin Yean* with him) (*Liza Chan & Co*) for the respondents in Civil Appeal Nos W–02–109–95, W–02–107–95 and W–02–448–95 (the first, second and third appeals).

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court):

Introduction

There are three appeals and a cross-appeal before us. All of them concern a recreational club known as 'The Raintree Club of Kuala Lumpur' ('the club'). They arise from the trial of two consolidated suits tried before the High Court at Kuala Lumpur. There are nine appellants in the first appeal. We will refer to them as 'the appellants' and in the order in which they appear in the title to the appeal. The respondents to the first appeal represent the club in a representative capacity. The second appeal has been brought by a company known as Allied Capital Sdn Bhd. We will refer to it simply as 'Allied'. The respondent to that appeal is also the club.

A The third appeal is by Allied against the order of the High Court directing Allied to pay the sum awarded against it into court as a condition for granting a stay pending appeal. Because we informed counsel at the outset that we would take time to consider our judgment, we concluded that there ought to be an unconditional stay pending our decision on the substantive appeals. Accordingly, we allowed the third appeal and directed B that there be an unconditional stay of execution upon the judgment against Allied pending the outcome of its appeal. We also ordered that there be no order as to costs and we directed that the deposit paid into court be refunded to Allied. So much for the third appeal.

In the court below, the appellants in the first appeal were all defendants C in a suit brought by the club, by way of a representative action. Allied, on the other hand, was the plaintiff in another suit in which the club was the defendant. In essence, the respondents in both appeals are the same or represent the same interest, namely, that of the club. For that reason, we will simply refer to them all as 'the respondents'. We will, in due course, D explain what each suit was about. We will also deal with the cross-appeal — which has to do with the orders for costs and interest made by the trial judge in Allied's appeal — later in this judgment. But we will first narrate the facts that led to this litigation.

Facts and chronology

E The story begins in 1978. In that year, officers of the Ayala Group of Companies in the Philippines came to Malaysia to look into the possibility of incorporating a proprietary club in this country. They had successfully launched such clubs in their country and thought that the same concept could be used here. It was a novel idea as there were no proprietary clubs F in Malaysia at that time. Ayala's officers met with the first and second appellants and discussed the project. They came to the conclusion that such a proprietary club as envisaged would be popular and draw much interest and support from members of the public here.

The concept of the proposed club may be briefly described. A company G was to acquire land and build a clubhouse with several facilities, including sports and other recreational facilities. The shares of the company that owned the club would then be sold to persons desirous of becoming members. These members would, by purchasing the shares, not only have the right to use the club's facilities but also acquire an interest in the H property on which the club was to be located.

As a first step in the process, land had to be acquired on which the clubhouse would be built. Ayala and its Malaysian partners ('the first and second appellants') identified a piece of land in a prestigious locality in Kuala Lumpur. The land in question belonged to a company called Raintree Development Sdn Bhd ('RDB'), whose shareholders and directors I were one Peter Yeoh, one Tan Chin Yong and the third appellant. RDB had an issued and paid-up capital of 1,500,000 shares of RM1 each.

In 1979, the first appellant, the second appellant, one Ramon Madrid and one Jose Reyes — the last two gentlemen being nominees of Ayala — acquired all the shares in RDB on a joint venture basis. After this acquisition, the shares of RDB were held as follows:

The first appellant	... 412,501 shares
The second appellant	... 487,500 shares
Jose Reyes	... 301 shares
Ramon Madrid	... 300,000 shares

The board of RDB comprised the first, the second and the fourth appellants as well as Reyes and Madrid.

In May 1980, Allied was incorporated for the purpose of building the club's premises. The shareholders of Allied were the following persons:

The first appellant	... 275,000 shares
The second appellant	... 325,000 shares
Jose Reyes	... 200,000 shares
Ramon Madrid	... 200,000 shares

In other words, the first and second appellants owned and controlled 60% of Allied's share capital while Ayala, through its nominees, owned the remainder.

The first, second and fourth appellants were also appointed as the directors of Allied.

Later, on 31 January 1981, the share capital of RDB was increased pursuant to a resolution of that date. The resultant shareholding came to be held as follows:

The first appellant	... 825,000 shares
The second appellant	... 974,999 shares
Jose Reyes	... 600,000 shares
Ramon Madrid	... 599,999 shares

When weighed in percentages, the nominees of Ayala held 40% of the shares in RDB, while the first and second appellants held the remaining 60%.

It does not require much intellectual exercise to realize that the preponderance of the shares in both RDB and Allied were, at all material times, held by the first and second appellants who, together with the fourth appellant, controlled the board of the two companies. This is an important consideration, for, as matters subsequently transpired, it is against these two gentlemen that charges of misconduct were primarily levelled.

To resume the narrative, on the same date, ie 31 January 1981, the four shareholders of RDB sold their shares to Allied for RM5,256,000. The purchase consideration was satisfied by the issue of one million shares in Allied to each vendor and by the assumption of liability by Allied of

loans granted by a company known as Allied First Capital Sdn Bhd to the first and second appellants to enable them to purchase the shares in RDB.

On 11 April 1981, RDB amended its memorandum of association and enlarged its objects to include the carrying on of the business of a country and sports club under the name and style of 'The Raintree Club of Kuala Lumpur'. This resolution was, no doubt, one of the first steps that was required to be taken to establish the proprietary club that had been earlier mooted.

On 4 May 1981, the board of RDB passed a resolution altering its share structure once again by issuing 1540 Class A shares of RM10,000 each and 660 Class B shares of RM10,000 each. The Class A shares were available for subscription only by Malaysians or by companies controlled by Malaysians. The way was thus paved for each of the 2,200 intended subscribers to become members of the club by purchasing from Allied one share from the appropriate class.

At the same meeting, a second resolution increasing the share capital of RDB from RM3m to RM22m was also passed. By a third resolution, 19 million shares were allotted to Allied at par value for cash to be paid up fully on allotment.

On 9 May 1981, RDB's board resolved that Allied be appointed as the contractor to construct the club's premises at a lump sum cost of RM19m. It was also resolved that the common seal of RDB be placed upon the building contract to be entered into with Allied. On the same day, Allied and RDB executed that contract. By cl 29.1 of that contract, Allied acknowledged receipt of the RM19m payable thereunder.

In June 1981, Allied applied to the Capital Issues Committee established under the Securities Industry Act 1983 for approval of its proposal to offer the shares of RDB to the public for the purpose of establishing the club.

On 2 July 1981, RDB resolved that it be converted from a private to a public company. This was necessary because of the proposed offer of its shares to members of the public. The name of the company was later changed to Raintree Development Bhd.

In September 1981, the Capital Issues Committee rejected Allied's application but suggested that the club be registered as a society under the Societies Act 1966. The appellants acted upon that suggestion.

On 21 October 1981, a meeting was held. The heading to the minutes of that meeting reads: 'The Raintree Club of Kuala Lumpur'. The appellants in the first appeal were present at that meeting. Other persons were present as well. But nothing turns upon their presence.

At that meeting, a protem committee of the club was elected. It comprised the first appellant as president, the second appellant as vice-president, the third appellant as secretary and the fifth appellant as treasurer. It was decided that the protem committee shall take necessary steps to have the club registered as a society under the Societies Act 1966. The meeting also discussed the club's proposed constitution.

In due course, an application was made to the Registrar of Societies for a temporary licence to enable the club to conduct its operations. On 23 February 1982, the registrar issued a temporary certificate of registration to the club.

A day later, that is to say, on 24 February 1982, the appellants in the first appeal met as the protem committee of the club. At that meeting, a membership committee was appointed. It comprised the third, fourth, fifth, eighth and ninth appellants. The meeting fixed the terms of reference of the membership committee as follows:

> Terms of Reference
>
> To advise the general committee on all matters pertaining to membership in the club and in particular to review and submit its recommendations on applications for admission to membership subject always that any persons whose application has been approved by this committee shall be admitted as a 'provisional member' of the club pending final approval by the general committee.

The minutes of the meeting of 24 February go on to say as follows:

> Reference was made to the inaugural meeting held on 20 October 1981 and it was resolved:
>
> > 'That the following persons who were present at the inaugural meeting and have indicated the desire for admission to membership in the club be and are hereby admitted to membership in the club subject to their completion of their respective application forms and the payment of the entrance fee.'

There then follows a list of names consisting of the appellants in the first appeal and two other persons. It is clear from the extract of the minutes, which we have reproduced above, that the appellants purported to admit themselves and the two other persons as members of the club. This part of the case received much attention in the court below and before us. We will deal with it at the appropriate place in this judgment.

On 8 April 1982, a resolution was signed by the third, fourth, fifth, eighth and ninth appellants as members of the membership committee of the club. It reads as follows:

> We, the undersigned, being all the members of the membership committee, do hereby RESOLVE:
>
> > 'THAT recommendation be and is hereby made to the general committee for the admission of the persons whose names appear in the schedule attached hereto to membership in the club and that subject to and pending the approval thereof by the general committee, pursuant to the powers vested upon this committee approval be and is hereby granted for the admission of the above-mentioned persons to provisional membership in the club.'

The schedule of which this resolution speaks sets out the names of about 300 persons, *including the appellants*. According to this document, therefore,

A the appellants were to rank together with other persons who had applied for and were awaiting membership.

On 3 June 1982, the protem committee met once again. It is an important meeting. The business transacted at it became an issue in the suit. For that reason, we will deal with it in some detail.

B All the appellants were present at this meeting. An invitee was also present. But nothing turns upon that presence. The meeting discussed the club's constitution. It also discussed a draft sale and purchase agreement under which the entire issued and paid-up capital of RDB was to be purchased by the club from Allied for RM47m.

C At that stage of the proceedings, the first to the fourth appellants declared their interest in Allied and informed the meeting that they would abstain from voting upon the purchase from Allied. The meeting then passed a resolution authorizing the first and second appellants as the president and vice-president of the club to enter into the sale and purchase agreement with Allied. The first to the fourth appellants did not vote upon
D that resolution.

We would pause to observe that the purpose of purchasing the RDB shares from Allied was to acquire, for the club, the building then under construction and the related facilities meant for the club. The shares were, of course, meant to be re-sold to applicants who had applied for
E membership.

The meeting of 3 June 1982 also recommended the appointment of Allied as the managers of the club. Lastly, the meeting resolved that an extraordinary general meeting of the club ('the first EGM') be convened on 16 August 1982.

F The first EGM was held on 16 August 1982. All those who had been purportedly admitted to membership at the meeting of 24 February 1982 were present. Before we set out the business that was transacted at this meeting, there are two observations that we wish to make about the first EGM.

G It will be recalled that, as at the date of the first EGM, there was a large number of persons who had, at the meeting of the membership committee held on 8 April 1982, been designated as 'provisional members'. They were waiting in the wings, so to speak. They were the people who were to ultimately bear the RM47m which was the cost of acquiring the
H RDB shares from Allied. Yet, not one of them was invited to attend the first EGM. Nor were they consulted in any way. No relevant information — indeed no information whatsoever — was given them.

It was conceded before us by counsel for the appellants that notice of the first EGM was not given to the provisional members. The reasons for
I this omission are connected with the issue of membership of which we spoke earlier. We will therefore address this latter aspect of the case when we deal with the former.

The second observation we make is this. It will be recalled that at the protem committee meeting held on 3 June 1982, the first to the fourth appellants declared their interest in Allied. No similar disclosure was made at the first EGM. It follows that an ordinary member to whom the minutes of the first EGM subsequently became available would be unaware, upon perusing them, of the conflict of interest that existed. Whether there ought to have been a further disclosure of the relevant interest at the first EGM and the weight, if any, that ought to be given to the omission to make such a disclosure are matters that we will deal with at the appropriate place in this judgment.

Returning for the moment to the first EGM, this meeting considered a number of matters. However, for present purposes, only two of these are of any importance.

Firstly, the proposed sale and purchase agreement under which the club was to purchase the RDB shares from Allied ('the share acquisition agreement') was discussed. The meeting unanimously resolved that the share acquisition agreement be entered into and that it be executed by the first and the second appellants as president and vice-president of the club.

Secondly, the EGM accepted the recommendation of the protem committee — in reality the appellants themselves — to appoint Allied as the managers of the club.

On 24 August 1982, the share acquisition agreement was signed. It was executed by the first and second appellants on behalf of the club and by the third and fourth appellants on behalf of Allied. The share acquisition agreement provided for the payment of the purchase price of RM47m by way of 19 instalments. The first of these instalments was to be paid on or before 31 May 1982, and the last was due on 30 November 1986. The share acquisition agreement also provided for the payment of interest.

On 20 October 1982, the club entered into a management agreement with Allied appointing the latter as the club's managers.

The final certificate of registration of the club as a society was issued by the Registrar of Societies on 20 January 1983. With this registration, the appellants, as members of the protem committee, became members of the club's general committee. The appellants then proceeded to admit some of the 'provisional members' as full members of the club. By 30 June 1983, some 291 persons were admitted as full individual members and 57 others were admitted as corporate members.

Later, the members of the club were informed by the general committee that the total cost of acquiring the club's premises from Allied was much more than the RM47m set out in the share acquisition agreement of 24 August 1982. Apparently, there were additional costs in the form of the premium that had to be paid for conversion of land use and those incurred as a result of variations to the building works. The new total stood at RM63m.

That this news caused dissatisfaction among the members of the club came across at the first annual general meeting ('the AGM') of the club which was held at the club's premises on 25 April 1984. As at the date of that meeting, the club had 654 members. The meeting appointed an ad hoc committee to study the share acquisition agreement and to ascertain whether the costs incurred in building the clubhouse were reasonable. The ad hoc committee produced its report on 30 November 1984. That document was highly critical of the appellants who, in due course, resigned as members of the general committee.

Meanwhile, Allied took the position that it was entitled to have performance of the share acquisition agreement. Although it had received RM41,168,896 from the club, there were still sums due to it. Accordingly, on 24 April 1986, it issued a writ claiming the unpaid balance of RM8,409,997 and interest at 2% per month at daily rests on the principal sum of RM5,831,104 from 1 April 1986 until the date of realization. To this, the respondents delivered a defence and counterclaim. They pleaded that the share acquisition agreement was invalid because it was tainted with undue influence. They also alleged that the true value of the RDB shares was only RM24,597,162 and that there had been overpayment to Allied. They therefore counterclaimed RM16,571,734 and all interest that had been paid to Allied, which amounted to RM556,752.

On 6 September 1986, Allied delivered its reply and defence to counterclaim and its counterclaim to the respondents' counterclaim. In this last pleading, Allied prayed for a declaration that the share acquisition agreement was void and unenforceable. In effect, it asked for restitutio in integrum on terms that the members of the club restore all benefits under the agreement to Allied, which would refund all money it had received from the club.

We would pause to observe that the declaration sought by Allied suffers from a grave defect in point of principle. A contract or other transaction which is the product of undue influence is not void but merely voidable. There is a significant difference between voidness and voidability. A transaction that is void is regarded by the law not to exist at all. But a transaction that is voidable is valid until it is avoided; either set aside by a decree of the court or by the innocent party rescinding it by his words or conduct. Therefore, strictly speaking, the declaration, in the terms in which it was couched, was doomed to failure.

Returning to the narrative, on 19 August 1986, the respondents, acting in a representative capacity, caused to be issued a writ against the appellants claiming, inter alia, damages for breach of fiduciary duty. In their defence, the appellants challenged the respondents' standing to bring the action in a representative capacity. They also denied that there had been any breach of fiduciary duty and asserted that they had acted with propriety in all matters concerning the club.

That, then, is a brief recitation of the factual chronology relevant to these appeals.

The issues

Although Mr Abraham of counsel for the appellants in his opening address to us outlined some 11 issues which he said were relevant to his clients' case, he agreed that upon the joinder as disclosed in the pleadings, the following are the primary issues as between the appellants and the respondents in the first appeal:

(1) whether the respondents had standing to bring the action on behalf of the club in a representative capacity;

(2) whether the appellants stood in a fiduciary capacity to the club;

(3) if the appellants were fiduciaries, then, whether they acted in breach of their duties;

(4) if the appellants did breach their duties, then, whether any injury resulted; and

(5) if there was injury, then, whether the proper relief was asked for and given.

As between Allied and the respondents in the second appeal, only two issues of fundamental importance arise. They are as follows:

(1) whether the share acquisition agreement was procured by the exercise of undue influence; and

(2) even if it was, then whether the respondents were entitled to an adjustment of the price as claimed by them, or, whether there ought to have been a rescission on terms as claimed by Allied in its counterclaim.

The learned judge before whom the trial was conducted determined all material issues in the respondents' favour and granted them the relief they had sought in each action. He also dismissed Allied's claim and its counterclaim.

Because of the order in which the appeals were argued before us, we find it convenient to deal with the issues raised in both appeals in seriatim.

The first issue: locus standi

The locus standi argument is a short point and may be easily dealt with.

Mr Abraham's submissions before the learned judge, which he repeated before us, are based upon the provisions of the Societies Act 1966 and in particular, s 9(c) thereof which reads as follows:

> 9(c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society;

Counsel argued that the word 'may' appearing in the section means 'must'. In other words, if a registered society — and the club in the instant case is such a society — desires to bring an action, it *must* do so in the name of its public officer or any other person who is registered as an officer of the society. A representative action would not, according to counsel, lie in such a case.

In dealing with the point, the learned judge first observed that it was not disputed that the club did not have a registered public officer at the time the action was instituted. He then went on to hold that the action was properly constituted. He relied upon the following passage in the judgment of Abdul Hamid J (as he then was) in *Ong Boon Seong v Syed Hussein Alatas* [1971] 2 MLJ 218 at p 221:

> It is argued that the plaintiff has no right to start this action for and on behalf of the society as he is not a registered public officer. Mr Ng Ek Teong, counsel for the plaintiff, submitted that the plaintiff is suing in his own name and he has properly instituted this legal action on the grounds, first, as a member, he instituted this legal action in the capacity of his individual right as a member. Secondly, he sues in his own right as a person who has been appointed secretary-general; and thirdly, he sues in the representative capacity authorized by the central committee. To my mind, it cannot be denied that as a member of the party, the plaintiff has the right to sue. Whilst it may be true that he sued in his own name, the fact remains that at all material times, he was holding the office of deputy secretary-general and a member of the central committee. In my opinion, the plaintiff is competent to institute these proceedings.

We have no hesitation in declaring that the passage above-quoted accurately represents the law and that the learned judge was quite correct in applying it to the case before him.

In our judgment, two matters must be kept in the forefront of one's mind in a case such as the present. First, that the action in the present case was instituted against those persons who were, at the material time, purporting to act in their capacity as officers of the club, namely, as office bearers and members of the protem committee, for allegedly breaching the fiduciary duties that they owed the club.

Second, due regard should also be had to the fact that it is the members of the club who are the ultimate victims of any wrongdoing on the part of the appellants: for it is they who have to pay the sum stipulated in the share acquisition agreement. It would be a travesty of justice to say, in these circumstances, that the only way in which the alleged wrong may be redressed is by suing in the name of the club's public officer.

If the proposition advanced by the appellants be accepted, then there would be no recourse for those who become the victims of the actions or omissions of the office bearers of a registered society. In the present case, the procedural device of a representative action, we believe, provides the necessary answer to the problem.

For these reasons, we reject the appellants' argument that the respondents lacked standing to bring the action in a representative capacity.

The second issue: fiduciary duty

The learned judge held the appellants to be fiduciaries on the footing that they were promoters of the club. He also held that the respondents came within the scope of the duty imposed upon the appellants. Both these findings were attacked before us.

Although there is bound to be some overlap between the two questions — whether there existed a fiduciary duty, and, if so, to whom this was owed — it is best that they be considered separately in order to appreciate the arguments of counsel in support of the first appeal.

(a) Are the appellants fiduciaries?

As we said a moment ago, the learned judge found a fiduciary relationship to exist on the basis that the appellants were promoters of the club. His judgment contains a useful analysis of the relevant authorities upon the subject and no useful purpose will be served by a regurgitation of these. Suffice that we produce the following paragraphs from the judgment of the learned judge which deal with the point that was raised before him:

> From the authorities cited by Raja Aziz, it can be concluded that a fiduciary relationship does not exist only in relation to a company. Such relationship also exists between two persons, such as when A entrusts to B the negotiation of a contract on A's behalf or for A's benefit and relies on B to procure for A the best terms available. Fiduciary relationships also exist between solicitor and client and between bank and customer, and in *Roche v Sherrington* [1982] 2 All ER 426, between the plaintiff and an uncorporated association. In the circumstances, I am satisfied that there is a fiduciary relationship between the promoters of the club and the club and/or the members of the club. In my opinion, *Erlanger* [*Erlanger v The New Sombrero Phosphate Co* (1878) AC 1218] applies to the present case.
>
> ...
>
> Mr Cecil Abraham, in his written submission at p 63, does not appear to dispute that the nine defendants are the promoters of the club. He says:
>
> > 'The nine defendants were the original protem committee members. They were what may be termed loosely the 'promoters' of the club in the sense that they were, together with two others, Junaidah and Angeline Low, the 'initial' founder members of the club.'
>
> I think Mr Cecil Abraham uses the term promoters 'loosely', because in his submission he is contending that whilst promoters of a company are in a fiduciary relationship with the company, promoters of a club do not have such relationship. He explains: 'whilst what authority there is relates to promoters of companies, there is no authority which clothes the founder members of a club with the status of fiduciary ...'
>
> I have earlier expressed my opinion on the law that the promoters of the club are in a fiduciary relationship with the club. In my view, Mr Cecil Abraham does not appear to dispute the fact that the nine defendants are

A the promoters of the club, subject to the qualification that they are not in a fiduciary relationship with the club.

After considering the submissions of both Raja Aziz and Mr Cecil Abraham on the question of who are the promoters of the Raintree Club, it is necessary for me to consider the facts in the present case because the question of whether a person is or is not a promoter is a question of fact to B be decided by the court.

Before us, Mr Abraham in the course of his oral argument conceded that his clients were, in a sense, promoters of the club but said that the fact pattern in the present case excludes any fiduciary relationship. Later, in his final reply, counsel put in an elaborate written submission in which he C argued, inter alia, that the term 'promoter' is a specialized term that applies only in the realm of company law so that the appellants were not promoters of the club.

In view of the stand taken by counsel during his final address to us, it becomes necessary to first determine whether the judge was wrong in D holding the appellants to be the promoters of the club before going on to consider whether he was right in holding that they are fiduciaries.

The learned judge, in the passage we have cited, correctly recognized that the question whether the appellants were promoters is one of fact. In this he is supported by respectable authority. See *Lydney & Wigpool Iron Ore Co v Bird* (1886) 33 Ch D 85 at p 93; *Twycross v Grant* (1877) 2 CPD E 469 at p 476; *Emma Silver Mining Co v Lewis* (1879) 4 CPD 396. In the last of these cases, it was held that a judge, when leaving the question whether the defendant was a promoter to the jury, need not go further and define the term for them.

Returning to the instant appeal, we find that the judge carried out an F admirable analysis of the facts and evidence before arriving at his conclusion in the following passage in his judgment (at p 23):

> In my opinion the members of the protem committee ... were the promoters of the club. The tasks of the committee were: (1) to obtain registration of the club under the (Societies) Act; and (2) to seek the approval of the G Registrar of Societies to operate the club pending its registration. All the nine defendants were in the protem committee and they were therefore the promoters of the club. I think this point is not in dispute. *Both Raja Aziz and Mr Cecil Abraham have submitted that the defendants who sat in the protem committee were the promoters of the club.* Since all the defendants were the promoters of the club, they are therefore in a fiduciary relationship with the H club. (Emphasis added.)

Raja Aziz Addruse of counsel for the respondents supported this conclusion formed by the learned judge. He submitted that there was no magic in the term 'promoter' and referred us to a number of authorities where the expression has been considered. It is quite unnecessary for us to deal with I them in this judgment. Counsel then formulated the following definition of the expression 'promoter' which we unhesitatingly accept as helpful and accurate: 'A promoter is one who starts off a venture — any venture — not solely for himself, but for others, but of whom he may be one.'

Having examined the evidence in the record provided and the careful reasoning of the judge, we are satisfied that he was correct in holding that the appellants were promoters of the club. Indeed, we accept that finding to accord with the totality of the circumstances that were presented to him.

In view of our acceptance of the learned judge's finding of fact that the appellants were promoters of the club, the case consequently turns upon a rather narrow fulcrum, namely, whether the promoters of a club are fiduciaries.

Counsel's criticism of the judge's approach to the question presently under discussion was wide ranging. However, his submissions may be summarized as follows:

(1) there were several bases upon which the judge proceeded to find the appellants to be fiduciaries. This included contract, entrustment and finally, the fact that the appellants were promoters of the club. All these are, according to counsel, incorrect bases upon which a fiduciary relationship may be founded in the circumstances of the present case.

(2) the judge, in coming to the conclusion that the appellants as promoters of the club were fiduciaries, relied upon decisions that were concerned with wholly different situations and had no bearing upon the issue in the present case.

(3) in arriving at his conclusion on the point, the judge was much influenced by the decision of the English Court of Appeal in *Swain & Anor v Law Society* [1981] 3 All ER 797, when it had been reversed by the House of Lords on further appeal. See [1983] AC 598.

(4) the judge had applied certain observations of Slade J in *Roche* which were made merely in the context of an application to strike out a pleading.

(5) the learned judge had not proceeded to act upon the analogy of promoters of a limited company. He had simply applied *Erlanger*, which is a case far removed from the present. The judge had accordingly misdirected himself on the law, in consequence of which there has been a miscarriage of justice.

(6) quite apart from the state of the authorities, the fiduciary concept was wholly inapplicable to the facts of the present case because there was, at all material times, no identifiable body of persons who could be said to be 'beneficiaries' to whom any duty could be said to be owed. In all the cases cited by the respondents, this element was clearly present.

Before we deal with the frontal attack on the judge's conclusion of law that promoters of a club are fiduciaries, it is convenient to dispose of the appellants' first submission. In view of the complaint made by counsel, we have subjected the learned judge's judgment to a close and careful scrutiny.

A However, we are unable to discern that the judge found a fiduciary relationship to exist upon one or more of the several bases suggested by counsel in his written argument.

A careful reading of the judgment discloses that the judge, in the process of analysing the several authorities cited to him by counsel, observed
B the diverse fact patterns and differing relationships in which a fiduciary relationship was found to exist. Those mentioned by the judge include contractual relations and cases involving entrustment. Ultimately, however, the learned judge found the appellants to be fiduciaries on the basis that they were promoters of the club. We therefore find the first submission advanced on the appellants' behalf to be devoid of merit and reject it.

C With that, we now turn to deal with the submission that is concerned with the issue at hand.

In a carefully formulated argument, Mr Abraham took us through the several cases relied upon by the respondents in support of the proposition that found favour with the judge for the purpose of demonstrating that
D they had no relevance to the present case. With respect to counsel, we do not think that any useful purpose will be served in our entering upon a discussion of these cases. In our judgment, the proper approach to a case as the present is to examine the equity jurisprudence upon the subject at hand with a view of determining whether the judge deviated so far from the
E well-trodden path as to warrant appellate interference.

For the purpose of deciding the present appeals, we find it unnecessary to undertake a survey of the historical development of the jurisdiction of a court of equity by which one in whom confidence was reposed ('the trustee') was disabled from obtaining for himself any benefit from a transaction falling within the scope of that confidence to the exclusion of
F the person reposing confidence and to whom the benefit ought properly to accrue ('the beneficiary'). Suffice to say that the jurisprudence that was originally applied to trustees and beneficiaries stricto sensu was, over a period of time, extended on a case by case basis to other relationships akin to a trust. It is this latter category that came to be known as a fiduciary
G relationship. For the purposes of the present appeals, we find it unnecessary to discuss the extent, if any, to which the extension was influenced by the Roman concept of a *fideicommissa.*

Because of the way in which the jurisprudence on the subject has developed, it is unsurprising to find that Parliament and judges have
H declined to define a fiduciary relationship and thereby to demarcate its parameters. In the case of the legislature, the nearest attempt to a definition of the relationship is to be found in s 2 of the Specific Relief Act 1950, which defines 'trust' and 'trustee' as follows:

> 'trust' includes every species of express, implied, or constructive fiduciary
I ownership;
>
> 'trustee' includes every person holding, expressly, by implication or constructively, a fiduciary character.

Judicial restraint in attempting a definition is exemplified by the following remark of Frankfurter J in *Securities & Exchange Commission v Chenery Corp* (1943) 318 US 80 at p 85:

> To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

The flexible approach adopted by the courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial impression dependent upon the fact pattern of a given case. Flexibility of approach is the hallmark of equity, for when we deal with the principles governing equitable intervention, we enter a domain comprising not rigid rules but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.

Equity has, in keeping with the purpose of its origin, therefore refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity. See *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382.

Thus, in *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at pp 728–729, Fletcher Moulton LJ said:

> It is said that the son was the manager of the stores and therefore was in a fiduciary relationship to his mother. This illustrates in a most striking form the danger of trusting to verbal formulae. Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the court with regard to them.

Again, in *Canadian Aero Service Ltd v O'Malley & Ors* (1973) 40 DLR (3d) 371 at p 383, Laskin J said:

> I need not pause to consider whether on the facts in *Regal (Hastings) Ltd v Gulliver* (1942) 1 All ER 378 the equitable principle was overzealously

A applied; see, for example, Gower, op cit at pp 535-537. What I would observe is that the principle, or indeed principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by
B Viscount Sankey [in *Regal*], nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. *In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.* (Emphasis added.)

C Whether a particular set of circumstances ought to attract a fiduciary duty is a question of judicial policy. It depends upon the standard of commercial morality that the courts of a particular jurisdiction may choose to impose upon parties to a transaction, having regard to the cultural background and circumstances of the society in which they function. And as in so many
D other areas of the law, the views which our courts entertain may differ from those expressed by the courts of other jurisdictions in respect of the circumstances in which a fiduciary duty may be declared to exist. For this reason, our courts may impose a fiduciary duty in circumstances in which the courts of another jurisdiction may decline to find the existence of such a duty. Often, the standards imposed may be the same as those in other
E jurisdictions. But it is open to our courts to find the existence of a fiduciary duty in order to reflect our own standards which, in particular cases, may prove to be higher than those imposed by judges in other jurisdictions. This is a necessary consequence of the policy differences of which we spoke a moment ago.

F That there may be a marked difference in judicial opinion even within the same jurisdiction when determining whether a fiduciary duty exists in a given set of circumstances is well-illustrated by the decision of the High Court of Australia in *Hospital Products Ltd v United States Surgical Corp & Ors* (1984) 156 CLR 41. We do not propose to dwell upon the
G facts of that case. Suffice for present purposes to say that the case concerned a distributorship agreement between the parties. The primary judge, McLelland J, found a fiduciary duty to exist on the facts as found by him. His finding was affirmed by the New South Wales Court of Appeal. On further appeal, the High Court was divided in its opinion. The majority (Gibbs CJ, Wilson and Dawson JJ) held that in the particular circumstances
H of the case, there was no fiduciary duty. They found liability on the footing that there had been a breach of contract. The minority (Mason and Deane JJ) took the view that the facts disclosed a fiduciary duty. The striking feature of the case is that the majority as well as the minority discussed almost the same authorities while arriving at opposite conclusions.

I Although all their Honours dealt with the question as to when a fiduciary duty may be imposed, we find it sufficient to quote from the judgment of Gibbs CJ (to reflect the majority view) and from the judgment of Mason J (to reflect the minority view).

There are two passages in the judgment of Gibbs CJ that are relevant. The first appears at p 68 of the report and reads as follows:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another – eg, partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

The second passage is at p 69 of the report and is as follows:

> I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations (see *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723, *Jenyns v Public Curator (Q)* [1953] 90 CLR 113 and *Phipps v Boardman* [1967] 2 AC 46) and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease: see *Re Biss, Biss v Biss* [1903] 2 Ch 40, *Griffith v Owen* [1907] 1 Ch 195 and *Chan v Zacharia* (1984) 154 CLR 178.
>
> In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused: *Tate v Williamson* (1866–67) LR 2 Ch App 55; *Coleman v Myers* [1977] 2 NZLR 225. However, an actual relation of confidence — the fact that one person subjectively trusted another — is neither necessary for nor conclusive of the existence of a fiduciary relationship; on the one hand, a trustee will stand in a fiduciary relationship to a beneficiary notwithstanding that the latter at no time reposed confidence in him, and on the other hand, an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.
>
> Another circumstance which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes. In any case, Mr Blackman was not in a position of dominance or advantage over USSC at the time the contract was made. Indeed, if there was any inequality in the situation of the parties, it might well be thought that USSC was in the stronger position.
>
> On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and

on an equal footing has consistently been regarded by this court as important, if not decisive, in indicating that no fiduciary duty arose: see *Jones v Bouffier* (1911) 12 CLR 579; *Dowsett v Reid* (1912) 15 CLR 695; *Para Wirra Gold & Bismuth Mining Syndicate (No Liability) v Mather* (1934) 51 CLR 582; *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342. A similar view was taken in Canada in *Jirna Ltd v Mister Donut of Canada Ltd* [1971] 22 DLR (3d) 639.

In *Reading v R* [1949] 2 KB 232, a case in which a soldier had obtained bribes by abuse of his position, Asquith LJ said (at p 236):

> 'A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise ... and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available ...'

And from the judgment of Mason J we quote the following passages (at pp 102–104):

> The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. Fiduciary relationships range from the trustee to the errand boy, the celebrated example given by Fletcher Moulton LJ in his judgment in *Re Coomber* [1911] 1 Ch 723, in which, after referring to the danger of trusting to verbal formulae, he pointed out that the nature of the curial intervention which is justifiable will vary from case to case. *In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case*: *Phipps v Boardman* [1967] 2 AC 46; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 NZLR 163; *Canadian Aero Service Ltd v O'Malley* [1973] 40 DLR (3d) 371. The often repeated statement that the rule in *Keech v Sandford* (1726) 25 ER 223, applies to fiduciaries generally tends to obscure the variable nature of the duties which they owe. The rigorous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respects. Thus, in the present case the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest (Kuys) cannot be usefully applied in the absolute terms in which it has been stated.
>
> McLelland J found — a finding with which I agree — that, as a fiduciary having responsibility for protecting and promoting the market for USSC's products in Australia, HPI was under a duty not to make a profit or to take a benefit by virtue of its position as a fiduciary without the informed consent of USSC and that within the ambit of its fiduciary responsibility it should not act in a way in which there was a possibility of conflict between its own interests and those of USSC: *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399. It was accepted in that case that 'possibility of conflict' needs to be understood in the sense of 'real sensible possibility of conflict' as was pointed out by Lord Upjohn in *Phipps v Boardman*. *The rule that a fiduciary is not entitled to make a profit without the informed consent*

of the person to whom the fiduciary duty is owed is not limited to profits which arise from the use of the fiduciary position or of the opportunity or knowledge gained from it, for it is said that the basis of this rule is that the fiduciary may not place himself in a situation where his duty and his interest conflict: Consul Development Pty Ltd v DPC Estate Pty Ltd (1975) 132 CLR 373.

The traditional view that the profit rule is merely a corollary of the conflict rule may be traced back to the speech of Lord Herschell in *Bray v Ford* [1896] AC 44. The view has been severely criticized, with some justification: see Shepherd, *The Law of Fiduciaries* (1981), at pp 147–151. And a recognition of its shortcomings induced Sir Frederick Jordan, in his *Chapters on Equity* (6th Ed, 1947) at p 115, to describe the conflict rule as a 'counsel of prudence' rather than a rule of equity. *Accordingly, the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect: Aberdeen Railway Co v Blaikie Bros* [1854] 1 Macq 461. By linking the obligation not to make a profit or take a benefit to a situation of conflict or possible conflict of interest, the proposition, in accordance with the authorities: (a) excludes the relevance of an inquiry into the actual motives of the fiduciary; and (b) excludes restitutionary relief when the interest of the fiduciary is remote or insubstantial: see *Boulting & Anor v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606; *Phelan v Middle States Oil Corp* [1955] 220 F (2d) 593.

In *Phelan,* the learned judge, in discussing the nature of the conflict that gives rise to the fiduciary's liability to account said (at p 602):

> 'Was that such a conflict as invokes the doctrine? It enables the beneficiary to hold the fiduciary liable for any profits he may make, or losses he may cause, in order to deprive him of any inducement that will affect his absolute and disinterested loyalty; and there is no doubt that an expectation or hope of future advantage may do so, even though it is not secured to him as an existing legally protected interest. Therefore, if the doctrine be inexorably applied and without regard to the particular circumstances of the situation, every transaction will be condemned once it be shown that the fiduciary had such a hope or expectation, however unlikely to be realized it may be, and however trifling an inducement it will be, if it is realized. We do not understand that it is to be applied so rigidly, or to so literal an extreme ... we have to determine the scope of the implementary rule that dispenses with the need of proving that his personal interest had any part in determining the fiduciary's conduct; indeed, with a rule that altogether forbids any inquiry whether it had any such part. We have found no decisions that have applied this rule inflexibly to every occasion in which the fiduciary has been shown to have had a personal interest that might in fact have conflicted with his loyalty. On the contrary in a number of situations courts have held that the rule does not apply, not only when the putative interest, though in itself strong enough to be an inducement, was too remote, but also when, though not too remote, it was too feeble an inducement to be a determining motive.' (Emphasis added.)

In *Frame v Smith* (1987) 42 DLR (4th) 81, Wilson J identified, by way of guidelines only, some of the primary characteristics of a fiduciary relationship. Her Ladyship there said (at p 99):

> Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) the fiduciary has scope for the exercise of some discretion or power.
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) the beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.
>
> Very little need be said about the first characteristic except this, that unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power: see, for example, *RH Deacon & Co Ltd v Varga, DuDomaine; Third Party* (1972) 30 DLR (3d) 653; affirmed 41 DLR (3d) 767.
>
> With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or 'practical' interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial well-being of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest. Finally, in *Reading v AG* [1951] AC 507 (HL), a British soldier who was unable (sic) to smuggle items past Egyptian guards because these guards excused uniformed soldiers from their inspections was held to be a fiduciary. The Crown's interest was a 'practical' or even a 'moral' one, namely that its uniform should not be used in corrupt ways. The soldier-fiduciary had no power to change the legal position of the British Crown, so how could the Crown's legal interests have been affected by the soldier's action? The same can be said of the Crown's interest in *AG v Goddard* (1929) 98 LJKB 743, where the Crown was able to recover bribes which had been paid to its employee, a sergeant in the metropolitan police. In my view, what was protected in that case was not a 'legal' interest but a vital and substantial 'practical' interest.
>
> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave

> inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639; affirmed 40 DLR (3d) 303. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, ie, any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

A review of the authorities reveals that the characteristics referred to by Wilson J are present in the well-established categories of relationships in which the duty has been held to arise. These include the relationships of spiritual adviser and penitent, doctor and patient, agent and principal, solicitor and client, company directors, partners and joint venturers. It is noteworthy that the fiduciary doctrine has even been extended to those in negotiation for a partnership or a joint venture. The concatenation of cases in which these relationships have been dealt with may be found in any standard textbook upon the subject, and for that reason we find it unnecessary to refer to all of them in this judgment.

Ought the doctrine to be made applicable to promoters of proprietary clubs? The appellants say it ought not. The judge held that it ought. With respect, we agree with the judge. In arriving at his conclusion, the learned judge was undoubtedly influenced by the decision of the House of Lords in *Erlanger v The New Sombrero Phosphate Co* (1878) AC 1218. In fact, he quoted extensively from the speeches delivered in that case so that it becomes unnecessary for us to enter upon a discussion of the case. Suffice to say that we find the reliance he placed upon *Erlanger* to hold that the appellants, as promoters, were fiduciaries to be a correct direction in law and to be entirely in keeping with the spirit and intendment of equity jurisprudence.

We are not unmindful of the appellants' complaint that *Erlanger* was not a case that concerned the promoters of a club. But it is a case that established the principle that the promoters of a business venture are fiduciaries in respect of those who participate in it. The absence of any authority in support of the proposition that the promoters of a club are fiduciaries does not, as counsel appears to have assumed, conclude the matter in the appellants' favour. The learned judge quite rightly applied a well-established doctrine of equity to the facts that were presented before him. That the consequence of his decision may be to extend the fiduciary concept to a new category of relations cannot, in our judgment, form a valid ground of complaint. As we have earlier said, this is the very way in which equity jurisprudence has always developed; and there is nothing in the judgment of the learned judge to suggest that he erred in principle or that his decision militates against the traditional approach adopted by a court of equity in this area of human activity.

A In our judgment, the instant case is merely an illustration of equitable protection being extended to fiduciary undertakings by analogy with well-established fiduciary relationships. And that, as we have pointed out, is entirely in keeping with equity jurisprudence. Further, the factual analysis carried out by the learned judge, with which we are entirely in agreement, reasonably supports the inclusion of promoters of a club within the scope B of the fiduciary doctrine.

Finding ourselves unpersuaded by the argument of counsel, we have no alternative but to reject submissions (2) through (5).

(b) To whom was the duty owed?

C We now turn to consider the argument that the appellants were not fiduciaries because there was absent, on the facts of this case, an identifiable class of persons to whom the duty could be said to have been owed. To appreciate this part of the case, it is necessary to refer to some of the evidence and to the way in which the point was argued before the learned D judge.

To recall, the appellants had met as the protem committee on 24 February 1982 and admitted themselves as members of the club. A day earlier, they had received a certificate of temporary registration from the Registrar of Societies. At that time, there were already other persons who E had applied for membership.

Based on these facts, the appellants mounted an argument before the learned judge to the effect that, at the date the impugned transaction was entered into, the appellants were the only *members* of the club. The 'provisional members' were not members in the true sense. Some of them F may later be admitted to membership, while others may not; and yet others may withdraw their application to become members. Further, the club, at the material time, only had a temporary certificate of registration, so that the respondents could not be members at all. Accordingly, if the appellants owed a duty to anyone, it was to themselves as members and to no one else. The appellants repeated these submissions before us.

G These arguments did not find favour with the learned judge, who found that at all material times, those persons who had applied to become members of the club, including the appellants, were provisional members. In arriving at this conclusion, he relied on the resolution of the membership committee dated 8 April 1982, according to which the appellants had been H designated as provisional members by the inclusion of their names in the schedule attached to that resolution.

The appellants, in an attempt to overcome the suggestion that they too were only provisional members, led evidence to show that their inclusion in the schedule was an error. The learned judge, however, rejected the I testimony of the witness called by the appellants to establish the point. The assessment of where the truth lies upon a particular question of fact being well within the province of the trial judge, it is not open to this court to lightly interfere with it.

Further, after having carefully read the evidence of the witness and having tested it against the probabilities of the case, we are driven to the conclusion that the explanation proffered is incredible. A

For these reasons, we accept the finding by the learned judge that the inclusion of the appellants in the schedule was neither an oversight nor an error. In the result, we agree with the learned judge that, as at the date of the impugned share acquisition agreement, the appellants were — like other applicants for membership — also provisional members. B

During argument, in response to a question put to him by a member of this court, counsel for the appellants conceded that as at 24 August 1982 (being the date of the share acquisition agreement), the appellants were conscious of the fact that there was a group of persons who had applied to become members of the club. Add to this, the fact that the appellants were aware that these persons would be the ones to share amongst themselves the financial burden created under the share acquisition agreement. It follows therefore — and this is implicit in the judgment of the learned judge — that there were, at all material times, an identifiable class to whom the appellants, as promoters of the club, owed a fiduciary duty. C D

Counsel's argument that there is no identifiable class because its members may fluctuate is easily met. Where a duty is owed to an identifiable class of persons, it is the class to whom the law directs its attention. Although persons within the class may leave it and others join it, the class does not lose its identity. In the present case, that class comprises all those persons who had applied for and were awaiting admission to membership of the club. True, some of those on the list of provisional members may decide not to join the club, while others may take their place. But that does not destroy the identity of the class to whom the duty is owed. E F

Once it is accepted that there was, in the instant case, an identifiable class, all the other arguments addressed to us in the appeal fall to the ground. And we will demonstrate this.

Counsel, while developing his submissions on the point now under discussion, argued that if the judge was correct in holding that all persons who had applied for membership were merely provisional members, then it would follow that the meeting of 3 June 1982 as well as the first EGM were meetings of the promoters, and of them only. Accordingly, when the club obtained its final certificate of registration from the Registrar of Societies, it was essential for those admitted to membership to ratify the share acquisition agreement. Since this was never done, the share acquisition agreement did not bind the club and the members could not therefore complain about its terms. G H

There are two answers to this argument. First, the point was not taken by the appellants in their defence. There is no suggestion in the pleadings that the club was not bound by the share acquisition agreement. Indeed, quite the opposite position was taken, for the appellants in their pleaded case averred that the club was estopped from challenging the share acquisition agreement and that they were accordingly bound by it. I

Second, no question of ratification arises because the claim here concerns the alleged breach of a fiduciary duty. The learned judge has held — and we have accepted this finding as accurate — that the appellants, when they met as promoters and approved of the purchase of the shares from Allied, owed a fiduciary duty to the club to ensure that the purchase price was fair and reasonable. Whether they discharged that duty is quite a separate matter which has to be considered later.

In these circumstances, it is idle to speak of ratification. What the appellants seem unable to comprehend is that the moment a conflict of interests arises, a strict duty to ensure fairness of the transaction results. That duty is best described in the words of Cardozo CJ in *Meinhard v Salmon* (1928) 249 NY 456 at p 464:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate.

The doctrine of ratification — which has its origins in the law of agency and has certain consequences with which we are presently unconcerned — when applied to companies, bears the same relationship to the fact pattern of the present case as does cheese to chalk.

We are, as we have said, entirely in agreement with the learned judge's finding of fact that the appellants were promoters and that in the circumstances of this case they were fiduciaries. We are also, for the reasons earlier given, of the view that the duty imposed upon the appellants by law was owed by them to the class of persons including the respondents. Accordingly, we uphold the finding of the learned judge upon the second issue and resolve it against the appellants.

The third issue: breach of duty

Having found that the appellants were fiduciaries and that they owed a duty to the respondents, the learned judge correctly went on to consider whether there had been a breach of the duty. After an examination of the evidence before him, he came to the conclusion that the appellants had acted in breach of the duty owed by them.

His reasoning upon the point is lengthy and contains a detailed and careful examination of the evidence. However, for our purposes, we find it sufficient to quote the following passages in his judgment (at pp 23–25):

> The next question to consider is whether there has been a breach of the fiduciary relationship.
>
> The sale and purchase agreement dated 24 August 1982 was entered into between Allied Capital on the one part and Tengku Abdullah and General Yusoff who signed on behalf of the members of the club on the other part. I have carefully examined the signature of the director who signed the agreement on behalf of Allied Capital and I am satisfied that it

is the signature of Yeoh Chong Swee, who was also at the material time a member of the protem committee of the club (see his signatures in AB–2 at pp 8, 36, 38, 42 and 45). In his evidence at p 340, Yeoh Chong Swee admits that he was appointed director of Allied Capital in 1981. The person who signed as secretary of Allied Capital is Low Nyap Heng, who was also a member of the protem committee of the club. His signature in the agreement is similar to that found in AB–2 at pp 8, 40 and 45. With regard to Tengku Abdullah and General Yusoff, it is clear that they are the major shareholders of Allied Capital. In my opinion, these four persons are in effect the vendors, as well as the purchasers and promoters of the club. The situation is similar to that in *Erlanger* where Jessel MR in his judgment in the Court of Appeal (1877) 5 Ch D 103 said, 'This action ... is by a company against certain persons who were the promoters of that company and who were the vendors to the company of a lease of the island Sombrero ...'. It is true that prior to the signing of the agreement, the four persons declared their interest in Allied Capital at the meeting of the protem committee of the club held on 3 June 1982. [See AB–2 at p 20]. But the other members present, namely, Leonard Tham, Tengku Azlan, Abdul Kadir Kassim, Lt Col Zarazillah and Clifford Tan proceeded on with the meeting and passed the following resolution:

> 'That the president and vice-president be and are hereby authorized to enter into the sale and purchase avgreement with Allied Capital Sdn Bhd for the purchase from the same the entire issued and paid-up capital of Raintree Developments Bhd for a total consideration of RM47,000,000 upon the terms and conditions set out in the said agreement (a copy of which is attached herewith).'

Although the four persons have declared their interest in Allied Capital, they, as promoters of the club, cannot run away from their fiduciary duty to the club.

Tengku Abdullah and General Yusoff who are the first and second defendants in the first suit, respectively, are the principal figures in this case. They are the controlling shareholders and directors of Allied Capital, Raintree Development and Cosmopleks.

Yeoh Chong Swee (the fourth defendant) is a director of Allied Capital, Raintree Development and Cosmopleks. He is a consultant of Allied Capital. In the protem committee he advised members on the sale and purchase agreement and how the purchase price of RM47m was arrived at. He signed the agreement on behalf of Allied Capital.

Low Nyap Heng (the third defendant) is the consultant who was responsible for setting up the club. He is in Cosmopleks. He is also a shareholder of Allied Capital. He is also a member of the protem committee. He signed the agreement as secretary of Allied Capital. Leonard Tham (the fifth defendant) and Clifford Tan (the eighth defendant) are employees of Allied Capital. Leonard Tham is also the financial manager of AF Capital. Both of them are members of the protem committee.

Abdul Kadir Kassim (the seventh defendant) is one of the shareholders of Cosmopleks. He was acquainted with Mr Reyes of the Ayala Group and he was brought in to help out with the project. He is the legal adviser of the Ayala Group and he drafted the memorandum of understanding. He was involved with the club project right from the beginning. He is also a member of the protem committee.

Tengku Azlan (the sixth defendant) is a director of Raintree Development. He is also a member of the protem committee.

Lt Col Zarazillah (the ninth defendant) was appointed to the protem committee by Tengku Abdullah and General Yusoff. He is an employee of Apera Sdn Bhd which is a company owned by Tengku Abdullah and General Yusoff.

> *In my opinion, each of the defendants has an interest either as shareholder, director or employee of the companies owned by Tengku Abdullah and General Yusoff, or the Ayala Group. When the protem committee passed the resolution on 3 June 1982 to purchase the shares in Raintree Development for RM47m, all the defendants were not in a position to act impartially.* There was no *independent* and intelligent judgment on the transaction to purchase the said shares. As promoters of the club they were in a situation of confidence. *I find that they were not in a position to give disinterested protection to the club. Indeed nothing was done for the purpose of protecting the interests of the club. The promoters failed to conduct an independent enquiry on the price of the shares. I find that there was bias on the part of the promoters and in the circumstances, no protection was afforded to the club.* (Emphasis added.)

The appellants have criticized the judge for the conclusions stated in the foregoing passages of his judgment. Mr Abraham submitted that the respondents had looked forward to having a club. They got it at the best available price. There was, therefore, he submitted, no breach of duty. After having given careful consideration to all the arguments advanced by Mr Abraham upon the third issue, we are left unpersuaded that the learned judge was wrong in the conclusion he arrived at.

To recall, at the meeting of the protem committee held on 3 June 1982, the first to the fourth appellants declared their interests in Allied. No such declaration was made at the first EGM that was held on 16 August 1982. None of those persons who had applied for membership was invited to attend this meeting. True that they had not as yet been admitted to membership. But we are unable to see any impediment to the appellants inviting these persons to attend as observers. After all, it is from their purses that the money to pay Allied was to come. The appellants, at the very least, ought to have explained to these persons what the protem committee proposed to do.

Raja Aziz has submitted that the so-called disclosure was no disclosure in law. In support of his argument, he cited *Gluckstein v Barnes* [1900] AC 240. The headnote to the report reads as follows:

> A syndicate was formed to raise a fund, buy a property and resell it to a company or some other purchaser; the fund to be in the names of trustees who were to promote and register a company to which they should resell the property, and who if a company should be formed were to be directors. The trustees bought up some of the charges upon the property for sums below the amount which the charges afterwards realized, and thereby made a profit for the syndicate of £20,000. They bought the property for £140,000, formed a limited company and resold the property for £180,000 to the company, of which they were the first and at that time the only directors. They issued a prospectus inviting applications for shares and disclosing the two prices of £140,000 and £180,000 but not the profit of £20,000. That

> some profit had been made by buying up the charges might have been discovered by a close examination of a contract which was referred to in the company's memorandum and articles of association and in the prospectus. Shares were issued and the company afterwards went into liquidation:
>
> > Held, that the trustees ought to have disclosed to the company the profit of £20,000; that they had not disclosed it; that the fact that the company could not now rescind was no bar to relief; and that the appellant as one of the trustees was bound to replace that portion of the £20,000 which had been paid to the trustees as their share.

Of the purported disclosure made by the appellant Gluckstein and his compatriot, Lord Macnaghten said (at p 249):

> In the second place, he says, that if he was in a fiduciary position he did in fact make a proper disclosure. With all deference to the learned counsel for the appellant, that seems to me to be absurd. 'Disclosure' is not the most appropriate word to use when a person who plays many parts announces to himself in one character what he has done and is doing in another. To talk of disclosure to the thing called the company, when as yet there were no shareholders, is a mere farce. To the intended shareholders there was no disclosure at all. On them was practised an elaborate system of deception.

We think that there is merit in the submissions made by Raja Aziz on this point. As observed by the learned judge, the appellants were so closely connected with each other, either directly or indirectly. They were all men who were wearing more than one hat. There was a serious conflict of interest in so far as the first to the fourth appellants were concerned. A reasonable man viewing the whole scenario would be disinclined to acknowledge that there had been any proper disclosure. As we have earlier said, the people to whom the disclosure ought to have been made were those awaiting admission to the club. But nothing was disclosed to them. It serves no purpose in speculating whether the concealment was intentional or merely imprudent. What remains is that there was absent anything that may be properly termed as a 'disclosure'.

Mr Abraham's answer to *Gluckstein* is that it is a company law case concerning promoters and directors. He says that the present case does not concern a company nor the promoters, nor even the directors of a company under formation. That is quite true. But we do not apprehend the remarks of Lord Macnaghten were meant to be confined to companies only. Those remarks are of general application to all relationships which attract a fiduciary duty. The points of difference which counsel has sought to draw are simply too fine. We might just as well be invited to estimate the number of angels that may dance upon the head of a pin. Accordingly, we have no difficulty in rejecting the attempt by counsel to distinguish *Gluckstein v Barnes*.

It is common ground that no independent advice or valuation was ever called for by the appellants when they decided to enter into the share acquisition agreement. That the learned judge was justified in holding that none of the appellants, when arriving at the purchase price of RM47m, was capable of acting independently is amply supported by the evidence.

Some of the appellants were either the shareholders and/or directors of Allied or RDB or other companies associated with Allied. Some were employees of one or the other of these companies. All of those who were not shareholders or directors of Allied were beholden to the first to the fourth appellants in one way or another. To regard them as persons having truly independent minds, as was contended by counsel, is to purchase a one-way ticket for travel from the sublime to the ridiculous.

As far as the first to the fourth appellants are concerned, they were directly interested in the subject matter of the contract. They could not have been blind to the fact that they were in truth and in fact contracting with themselves but committing others to meet the financial burden.

Indeed, we are unable to see any clearer case where the interest of the class to whom the duty was owed lay in conflict with the financial interests of the appellants. The former were the paymasters. Of the latter, the first and second appellants were the directors and the shareholders of Allied, controlling 60% of its shares. The fourth appellant was also a director of Allied.

It was in the interests of the former that the purchase price be kept as low as reasonably possible to ensure that the burden that each individual member of the club had to eventually bear was not intolerable. The interests of the latter lay in quite the opposite direction. They were there to ensure that the highest possible profit was reaped by Allied so that its shareholders received the largest possible dividends out of the profits from the venture.

It is all quite well for the appellants to say that in their opinion, the price was fair and reasonable. But there must, as submitted by Raja Aziz, be some independent basis upon which the opinion may be held. Needless to say there was no such basis. At the end of the day, one cannot escape the conclusion that the opinion held was tainted; having been expressed by people whose interests lay in obtaining for Allied the highest possible price for the RDB shares. Any protestation by these appellants that they acted honestly and in good faith having the best interests of the club at heart is quite useless, for neither dishonesty nor bad faith is a necessary ingredient of the wrong with which they stand accused.

We pause to observe that of all the appellants, only the fourth and the fifth gave evidence before the judge; the former as a witness on behalf of the appellants, the latter as a witness for Allied. It is an amazement that the first and second appellants whose conduct was under severe criticism, and the seventh appellant who was being canvassed as an independent person, never came forward to testify. Small wonder therefore that Raja Aziz complained of their absence from the witness box. Having studiously avoided giving testimony, these appellants have none other than themselves to blame for the conclusions arrived at by the learned judge.

So much for the question whether there was a breach of duty.

Ordinarily, we would have now dealt with the fourth and fifth issues in sequence. However, these two issues are connected with the seventh

issue. For that reason we shall, for convenience, deal with all three of them together, after our consideration of the sixth issue.

The sixth issue: Undue influence

Before entering upon a discussion of this issue, it may be appropriate to remind ourselves of the context in which it arose.

To recall, Allied brought a separate action against the club to recover what it said was due to it under the share acquisition agreement. The respondents resisted that action on the ground that the agreement had been procured by undue influence. By their counterclaim, the respondents asked for a refund from Allied of the difference between RM47m and the sum which they claimed as being the fair value of the shares.

Faced with this, Allied delivered its counterclaim asking for rescission of the share acquisition agreement. This was done on the footing that, if the transaction had been vitiated by undue influence, there ought to be restitutio in integrum so that the parties could return to the status quo ante. That would mean that the members would have no club but would receive a full refund of the money paid by each of them.

The respondents resisted Allied's counterclaim on the basis that rescission was not the appropriate remedy in the circumstances of the present case. They argued that adjustment of the price was the proper remedy as the object sought to be achieved was the disgorgement by Allied of money which it was not entitled to keep.

In arguing Allied's appeal, Mr Anantham repeated most, if not all, of the submissions he had made before the learned judge. Having heard him and Raja Aziz in reply, we must say, meaning no disrespect to Mr Anantham, that the difference in opinion between him and his learned opponent lies in Allied's misappreciation of the true extent of the principles that govern equitable intervention upon the ground of undue influence.

For present purposes we may, we think, safely confine our discussion to the doctrine of undue influence as it operates in this country. Although much of the jurisprudence upon the subject is common throughout the Commonwealth, it is best that we hearken to the relevant statutory provision through which the doctrine finds expression. That provision is s 16 of the Contracts Act 1950 which (the illustrations apart) is in the following terms:

> 16(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

A (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950.

C It has been recognized that the section does not differ from the English law upon the subject of undue influence. See *Poosathurai v Kannappa Chettiar* (1919) *Times, 19 November*. Decisions of English courts are therefore a useful guide to the approach that our courts ought to adopt to the interpretation of s 16. Much the same may be said of the decisions of the D courts of those jurisdictions where the law upon the subject of undue influence is the same as English law.

That said, we are of the view that our courts, when faced with a case of undue influence in the sphere of the law of contract, must primarily hearken to the words which Parliament has used to introduce the doctrine into our jurisprudence. While we may refer to the decisions of courts of E those jurisdictions where the law is akin to our own, we must therefore ultimately have regard to the words of our own statute.

In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case *solely* by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English F courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.

Thus, in *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417 at p 431, the House of Lords expressed its readiness to apply the doctrine to non-marital cohabitees. Lord Browne-Wilkinson, with whose speech the G other members of the House concurred, said:

> I have hitherto dealt only with the position where a wife stands surety for her husband's debts. But in my judgment the same principles are applicable to all other cases where there is an emotional relationship between cohabitees. The 'tenderness' shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting H the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognize this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. Therefore if, but only if, the creditor is aware that the surety is cohabiting with the principal debtor, in my judgment the same principles should apply to them I as apply to husband and wife.

The views expressed in *O'Brien*'s case merely reflect the law's attempt to keep in tandem with the moral standards of the society in which an English

court functions. Our society, on the other hand, has an entirely different set of moral standards. It would therefore be quite wrong to blindly follow all foreign decisions if the result would facilitate moral decadence within our social structure.

Accordingly, on grounds of public policy, this court will not extend the doctrine to those non-marital relationships alluded to by Lord Browne-Wilkinson in the passage quoted above. Our refusal to act in such cases is based upon the policy consideration that refusing to accede to such an extension may deter a fall in the moral standards of our society.

The right to modify principles of the common law and doctrines of equity that have their historical origins in England to suit domestic needs of another jurisdiction has been very recently recognized by the judicial committee of the Privy Council in *Invercargill City Council v Hamlin*, Privy Council Appeal No 36 of 1995, yet unreported. It is an appeal from New Zealand. Speaking in quite a different context, Lord Lloyd of Berwick, when delivering the advice of the board, said:

> But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be 'yes'. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

Undue influence, like all other equitable doctrines, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. For this reason, it is important to apply the doctrine, as housed in s 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. This is to be done by interpreting s 16 in a broad and liberal fashion. Being a remedial provision — in the sense that it is designed to relieve obligations — it should, in our judgment, be given a liberal interpretation. Even in cases which are not stricto sensu contractual in nature, the section may be resorted to by analogy. Another reason for adopting this approach to interpretation lies in the absence of any intention on the part of Parliament to alter the doctrine or to deprive it of the flexibility it has acquired through historical development.

As we apprehend Mr Anantham's submissions, his principal complaint lies in the approach to the doctrine suggested by Raja Aziz — an approach that commended itself to the learned judge. Mr Anantham has submitted that the respondents' pleadings in the court below refer to undue influence, plain and simple. The way in which the case was argued, and the findings of the judge fell well outside the purview of the pleaded case.

Now, it is quite true that the respondents' pleading speaks of undue influence and of domination. True it is, that the facts of this case certainly do not fall within any of the traditional categories of relationships in which a court of equity intervenes to relieve a party who has entered into a disadvantageous bargain with one whose undue influence occasioned it.

A But, as we observed a moment ago, the categories to which the doctrine applies are not closed and it is a question of subjecting the facts of a particular case to meticulous scrutiny in order to determine if there is room for the operation of the doctrine. And it must be said, in fairness to Raja Aziz, that when he came to make his oral submissions, he made it absolutely plain that he was not relying upon the doctrine in any traditional
B sense.

The record provided shows that a verbatim transcript of the proceedings was taken and reproduced. We have carefully read the whole of the oral argument of counsel in the court below. Had *Allied*'s case been prejudiced in any way by Raja Aziz's line of argument, Mr Anantham
C would, no doubt, have registered his most vigorous opposition. However, the verbatim transcript of the proceedings does not show any protest by Mr Anantham that the respondents were, at the stage of argument, transgressing the parameters of the pleaded case, or that he had been taken by surprise by the way in which the respondents had presented their case
D during submissions. We therefore entertain no difficulty whatsoever in rejecting Allied's complaint that the respondent argued an unpleaded case. Indeed, for reasons which will become plain in a moment, the respondents' pleaded case sufficiently accommodates the argument advanced by them, and the judge was quite correct in approaching the case from a broader standpoint.

E The domination of the will of a person of which s 16 speaks may occur in a variety of fact patterns. It may occur even in commercial transactions. See *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326; *National Westminster Bank plc v Morgan* [1985] 1 All ER 821; *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417; *CIBC Mortgages plc v Pitt & Anor*
F [1993] 4 All ER 433. The broad spectrum within which the doctrine operates is illustrated by the decision of the English Court of Appeal in *Tufton v Sperni* [1952] 2 TLR 516.

In that case, the plaintiff purchased from the defendant a house on terms that were grossly unfair to the former. The house was bought for the
G purpose of using it as a Muslim cultural centre to be promoted by a committee comprising the plaintiff, the defendant and one Ghafur. Later, the plaintiff brought an action to set aside the purchase on the ground of undue influence. The trial judge — Romer J — negatived undue influence. He found that the domination of the plaintiff's will by the defendant had not been proved by the evidence. The plaintiff appealed, contending that
H a court of equity was seised of a broad jurisdiction to relieve a person from a bargain made with another who, by virtue of the relations between them, owed a duty to disclose all material facts. The Court of Appeal allowed the appeal and set aside the purchase.

We find the following passages in the judgment of Evershed MR to
I be particularly instructive:

> Before the judge there is no doubt that the burden of *Tufton*'s case was the allegation of undue influence, as that phrase is perhaps most commonly understood. Tufton, that is to say, set out to prove that Sperni had, by

virtue of his professional position and otherwise, acquired a complete control, or domination, over Tufton, so that the latter ceased in effect to be a free agent, and his mind became a mere vehicle for Sperni's schemes. On this, the main issue in the case, the judge concluded that Tufton had failed to discharge the onus of proof laid on him. Sir Geoffrey Hutchinson has not before us challenged this finding; and after considering the transcript of the evidence, and bearing in mind that the judge saw the witnesses it would, in my judgment, be impossible so to do.

Before this court *Tufton*'s case has been really put on a ground which appears to have played a fainter part in the court below, namely, on the broad jurisdiction of the Court of Equity to relieve a party from a bargain made with another where, on a consideration of the facts of the case, it is shown that that other stood in such a relation to the first party that he owed him a duty of care and candour, and was bound to make to him full disclosure of all material facts.

[His Lordship considered the pleading, and continued:]

It is, I think, clear that a claim for relief from a transaction on the ground that it was procured by or entered into under the 'undue influence' of the party charged, includes, as a matter of law, both undue influence in the sense of domination of one over another, and also abuse of the duties of care and confidence which may be imposed on one party towards another as a result of the particular relationship which emerges from the special circumstances of their association. So much follows, I think, from the language of Lord Eldon in *Huguenin v Baseley*, 14 Ves 273 and the passage to which I wish to refer is where Lord Eldon said:

> 'To the question, whether, these instruments being such as I have represented them, the co2nsequence is, that this Court shall undo them, I answer, no; if they are pure, voluntary, well-understood, acts of her mind: but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind, providential, interference, to which she was looking, for the management of her affairs with advantage and facility to herself, if the conveyance was executed under the effect of that, which has always been considered in this court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well-understood, acts of her mind, this court will undo them.'

It follows too from the language of Wright J in *Morley v Loughnan* [1893] 1 Ch 736, where the claim was based on undue influence:

> 'The plaintiffs claimed an account of the dealings between the deceased and the defendant, and payment by the defendant of all sums obtained by undue means';

and it is also clear from the opening passage of Sir Charles Russell's argument that the case was put alternatively; either because the gifts were the result of influence expressly exercised by the donee, or because the relations between the donor and donee were such as to raise a presumption of influence, and the same appears from Sir Charles' reply. Wright J said (at pp 751–752):

> 'There is no doubt about the law, which is illustrated by numerous cases collected in *White* and *Tudor's* work under the leading case of *Huguenin v Baseley* 14 Ves 273 and continuing down to the case of

A *Allcard v Skinner* [1887] 36 Ch D 145. That law is, that where large voluntary gifts are made and accepted inter vivos, the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing. In this case that capacity and knowledge are not disputed. Proof may then be given against the recipient to show that the donor's intention to give was produced by undue influence, and then the courts of course set it aside, unless the transaction as a whole was a benefit to the donor. Or the donor may show that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations.'

C I refer particularly to the judgment of Lindley LJ in *Allcard v Skinner*, where he observes that cases of undue influence fall naturally into two groups, sometimes overlapping, but the second of which clearly comprehends, in my judgment, the case presented to us on this appeal. The passage is as follows (at p 181):

D 'The doctrine relied upon by the appellant is the doctrine of undue influence expounded and enforced in *Huguenin v Baseley* and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap. First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and E generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor ... The evidence does not bring this case within this group. The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for F him.'

For these reasons, I think that the case formulated before us by Sir Geoffrey Hutchinson is open to him on the pleadings.

The question then (and it is, I think, the only substantial question, but a difficult question) is whether on the very unusual and altogether remarkable G facts of the case, as proved or found by the judge, there existed at the material time such a relationship of confidence between Sperni and Tufton as imposed on the former a duty of candour such that on a breach of that duty being shown, a court of equity will intervene.

The principle on which the courts of equity have acted was stated by Lord Eldon in *Huguenin v Baseley* thus:

H 'The question is, not, whether she knew what she was doing, ... but how the intention was produced; whether all that care ... was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.'

I In other words, the relation must be one which makes it the duty of one party to take care of the other; and the principle is, for present purposes, well-illustrated by *Tate v Williamson* (1866–67) LR 2 Ch App 55 before Lord Chelmsford LC on appeal. I cite as my text the following passage from the beginning of the Lord Chancellor's judgment (at p 60):

> 'The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.'
>
> I observe and repeat that 'the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise'. *The existence of the jurisdiction and the right and duty to exercise it must in every case depend on the special facts of that case and the inferences properly to be drawn from them.* (Emphasis added.)

Tufton v Sperni was approved by the Privy Council in *New Zealand Netherlands Society 'Oranje' Inc v Kuys* (1973) 2 NZLR 163, where Lord Wilberforce, when delivering the advice of the board, said:

> Their Lordships are in agreement with these contentions in so far as they stress the necessity to give consideration to the nature of the relationship between Kuys and the society and to the question whether that relationship imposed upon him, in relation to the particular transaction under investigation, duties of a fiduciary character. The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasized by the House of Lords (*Boardman v Phipps* [1966] 3 All ER 721). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different application in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, *but the precise scope of it must be moulded according to the nature of the relationship*. As Lord Upjohn said in *Boardman v Phipps* (at p 756):
>
> > 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.' (Emphasis added.)

We have no hesitation in accepting that the principles and guidelines formulated by Evershed MR in *Tufton v Sperni* [1952] 2 TLR 516 and in the authorities quoted by him represent the jurisprudence that underlies s 16 of the Contracts Act 1950.

To reiterate, the proof of dominance of the will of a party to a transaction — be it a gift, a sale or purchase or a charge upon property — by the other party to the transaction is not a *sine qua non* of the doctrine of

A undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed.

While we are upon the subject, we may refer to another principle that is a necessary adjunct to the doctrine and which is often overlooked when B the doctrine comes to be applied. Where a transaction is tainted by undue influence, then it is invalid as between the parties thereto and their privies. It is also invalid as against any other person who seeks to enforce the transaction with knowledge or notice, actual or constructive, that it was procured by undue influence or any other vitiating element. A third party may safely take under such a transaction and enforce it if, and only if, he C is a bona fide purchaser (as opposed to a volunteer) for value *without notice* (actual or constructive) of the invalidating circumstances. We may mention in passing that the doctrine of the bona fide purchaser for value without notice finds expression, in the context of the specific enforcement of contracts, in s 26(b) of the Specific Relief Act 1950.

D In *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417, Lord Browne-Wilkinson explained the applicable principle. The first passage in his speech appears at pp 424–425 of the report and reads as follows:

> Up to this point I have been considering the right of a claimant wife to set aside a transaction as against the wrongdoing husband when the transaction E has been procured by his undue influence. But in surety cases the decisive question is whether the claimant wife can set aside the transaction, not against the wrongdoing husband, but against the creditor bank. Of course, if the wrongdoing husband is acting as agent for the creditor bank in obtaining the surety from the wife, the creditor will be fixed with the wrongdoing of its own agent and the surety contract can be set aside as F against the creditor. Apart from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequentially of the wife's equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor (albeit a purchaser for value) as well as against the husband: see *Bainbrigge v Browne* (1881) 18 Ch D 188 and *Bank of Credit* G *and Commerce International SA v Aboody* [1992] 4 All ER 955 at p 980). Similarly, in cases such as the present where the wife has been induced to enter into the transaction by the husband's misrepresentation, her equity to set aside the transaction will be enforceable against the creditor if either the husband was acting as the creditor's agent or the creditor had actual or constructive notice.

H The second passage appears at pp 428–429 of the report. There, his Lordship said:

> A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary I principles of equity, her right to set aside that transaction will be enforceable against third parties (eg against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts giving rise to her equity. Although there may be cases where,

without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.

The doctrine of notice lies at the heart of equity. Given, that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it. Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

We would add that although the remarks of the learned Law Lord were made in the context of a security transaction, they apply with equal force to all transactions which are sought to be impeached on the ground of undue influence.

Returning to the present case, the learned judge found there existed a fiduciary relationship in the circumstances earlier adumbrated and we have accepted his conclusions upon this issue. Mr Anantham, however, argues that that finding was made against the appellants in the first appeal and not against Allied. The latter is a separate corporate personality. He says that the existence of the fiduciary relationship as declared by the learned judge to exist did not, therefore, extend to Allied.

The response by counsel necessitates a recall of what the learned judge said in this context. Although we have quoted him in extenso, it is best that we reproduce the relevant passages to remind ourselves of what he said (at p 24):

> Tengku Abdullah and General Yusoff who are the first and second defendants in the first suit, respectively, are the principal figures in this case. *They are the controlling shareholders and directors of Allied Capital,* Raintree Development and Cosmopleks.
>
> ...
>
> In my opinion each of the defendants has an interest either as shareholder, director or employee of *the companies owned by Tengku Abdullah and General Yusoff,* or the Ayala Group. When the protem committee passed the resolution on 3 June 1982 to purchase the shares in Raintree Development for RM47m, all the defendants were not in a position to act impartially. There was no *independent* and intelligent judgment on the transaction to purchase the said shares. (Emphasis added.)

It is implicit from the foregoing passages that the learned judge found the first and second appellants to be the de facto controllers of Allied. In

reality, they were the puppet-masters. Allied was the puppet. The evidence led at the trial certainly warrants the conclusion formed by the judge and, no doubt for that reason, it has not been attacked in any earnest before us. Any such attack will, of course, be repulsed by the undisputed facts and by the inference to be drawn from the conspicuous absence of these two gentlemen from the witness box.

Now the findings against Allied may be justified upon two legal bases. The first is that the relationship between the first and second appellants and Allied was such that their knowledge may be safely said to be that of Allied. The second is that they are to be regarded as Allied's alter ego so that the corporate facade, upon which counsel has relied in argument, may be pierced to reveal the true picture. Either basis is reasonably supported by the facts and the justice of the case.

The first ground finds support from the following passage in the advice of the Privy Council delivered by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 at pp 922–923:

> Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.
>
> The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as 'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company': see *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Ltd* [1983] 2 All ER 563.
>
> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. *The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.* It is worth pausing at this stage to make what may seem an obvious

> point. Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable, even banal remark. And of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no 'ding an sich', only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company.
>
> The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. (Emphasis added.)

In our judgment, the conclusion that Allied had obtained an advantage through undue influence, in the sense we have earlier discussed, may be founded upon the general rules of attribution. This is not one of those exceptional cases adverted to by Lord Hoffmann in his speech.

To elaborate, there is a specific finding by the learned judge (which we have upheld) that the first and second appellants (among others) were fiduciaries and that they abused the confidence placed in them because they did not seek independent advice in respect of a transaction under which they stood to reap huge profits. Additionally, there is the fact that Allied was involved in the whole transaction through these two appellants as its de facto controllers. Their abuse of the confidence reposed in them, in the circumstances of this case, is to be equated to an abuse of confidence by Allied. The learned judge's conclusions against Allied are therefore sufficiently borne out by the law as applied to the emerging fact pattern.

Upon the second basis, there is, as we have observed, a sufficient factual foundation which, in justice, warrants the piercing of Allied's corporate veil. Although he did not say it in so many words, this is precisely what the learned judge did. And we find ample justification upon principle and authority for this.

In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, Salleh Abas FJ, when dealing with the rule of corporate personality, said (at p 112):

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well-established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. *The court seems quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case so demands.* Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent

company or vice versa as was decided in *Smith, Stone and Knight v Birmingham Corp* [1938] 4 All ER 116; *Re FG (Films) Ltd* [1955] 1 WLR 483 and *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464. Prof Gower, in *Gower's Principles of Modern Company Law* (3rd Ed, 1969) at p 213, said that the courts:

> 'are coming to recognize the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* (1937) 58 Ll LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity ... in name alone and probably for the purposes of taxation'. In another case, *Spittle v Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 per cent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, per Devlin LJ at p 202) ... A good example of this is *Bird & Co (London) Ltd v Thomas Cook & Son Ltd and Thomas Cook & Son (Bankers) Ltd* [1937] 2 All ER 227, in which an endorsement of a cheque to 'Thomass Cook & Son Ltd' was treated as an endorsement to the allied but separate company of Thomas Cook & Son (Bankers) Ltd by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet.*' (Emphasis added.)

Again, in *DHN Food Distributors Ltd & Ors v Tower Hamlets London Borough Council* [1976] 1 WLR 852 at p 860, Lord Denning put the proposition in these words:

> Third, lifting the corporate veil. A further very interesting point was raised by Mr Dobry on company law. We all know that in many respects a group of companies is treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Prof Gower, in *Gower's Principles of Modern Company Law* (3rd Ed, 1969) at p 216 says:
>
> > 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group.'
>
> This is especially the case when a parent company owns all the shares of the subsidiaries — so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company DHN should

be treated as that one. So DHN are entitled to claim compensation accordingly.

In the case at hand, the respondents had, with no protest from the appellants in the first appeal, or for that matter Allied, led evidence to show that the first and second appellants controlled Allied. Once the evidence was in, it was open to the learned judge to judicially appreciate it. This he did. No quarrel may therefore be had with his reasoning.

Mr Anantham complains that the judge did not state the legal basis for holding Allied to have exerted undue influence. While that may well be so, it does not provide any justification for this court to interfere with the conclusions arrived at by the learned judge. We have, in the course of this judgment, demonstrated that there is ample legal basis in support of the learned judge's conclusions. This is not a case where there was absent any legal basis for the conclusions arrived at by the learned judge. Rather, is it a case where there exists such a basis, without the learned judge having to discuss it at any great length?

For these reasons, we are entirely in agreement with the conclusions of the learned judge — legal and factual — upon the issue of undue influence. With that, we now turn to the fourth, fifth and seventh issues which may be conveniently dealt with together.

The fourth, fifth and seventh issues: Injury and relief

In order to appreciate the arguments of counsel, it is necessary to recall to our minds the relief awarded by the learned judge in each of the consolidated actions. In the first action (the subject matter of the first appeal), having found that the appellants had acted in breach of their fiduciary duty, the learned judge proceeded to enter judgment against them for damages to be assessed. In respect of Allied's action (the subject matter of the second appeal), he entered judgment on the respondents' counterclaim.

Although there is partial overlap in the criticism that has been levelled against the relief awarded by the judge, the arguments of Mr Abraham for the appellants and Mr Anantham for Allied necessarily diverge upon important points that are of peculiar importance to each of them. It is therefore desirable that their arguments are separately considered.

The appellants' complaint is that even if there was a duty which had been breached (neither of which was conceded), the club had suffered no injury. The members had contracted for a club and they got it. The learned judge was wrong in the approach he adopted in assessing the value of the shares of RDB. He overlooked relevant material that ought to have been taken into account. In particular, the share valuation made by the appellants at RM47m was fair and reasonable and the judge ought not to have rejected this valuation. So much for the appellants' main submissions.

Allied's complaint is principally directed against the nature of the relief awarded against it. Given that the transaction was tainted by undue influence, the only proper remedy is rescission as claimed in Allied's counterclaim. The order for recovery which the judge made amounts to

A the respondents having an adjustment of the price. And this clearly runs counter to the authorities, all of which are unanimous in declaring that a plaintiff is merely entitled to avoid a contract which is the product of undue influence. A plaintiff is not entitled to affirm a transaction and to obtain adjustment of the price. He must either accept the contract with all its benefits and burdens, or give it up and return to the status quo ante B through the process of restitutio in integrum. In any event, the orders made by the judge in the two actions amount to double recovery in the respondents' favour. So much for Mr Anantham's arguments.

Before we comment on these submissions, it is necessary to see how the judge approached the question. This is what he said (at pp 33–34):

C

> In the present case, the Raintree Development shares were purchased by the defendants for RM47m. The sale and purchase agreement dated 24 August 1982 was signed by Tengku Abdullah and General Yusoff on behalf of the club. I have made a finding that the defendants as promoters of the club were in a fiduciary relationship with the club. I have also made a D finding that there has been a breach of fiduciary duty by the defendants. DW1, the accountant, confirmed the figure of RM47m. But I find that his evidence is unsatisfactory. His view on the interest was not accepted by DW4. The view was also not accepted by DW6. In the circumstances I find that DW1 is an unreliable witness, and his evidence cannot be accepted. PW2, the accountant who testified for the plaintiff, said that the entire value E of the shares as at 24 August 1982 was RM25,718,000. I find that PW2's evidence is more acceptable based on the reasons given by him in arriving at that figure. It is therefore my finding that the value of the shares as at 24 August 1982 was RM25,718,000. In the counterclaim, the defendant however states that the actual value of the shares purchased was RM24,597,160. The defendant claims that they have paid a sum of RM41,168,876 to the F plaintiffs and therefore they are entitled to counterclaim the sum of RM16,571,734. In my opinion, judgment should be entered on the defendant's counterclaim for the sum of RM15,450,876 being the difference between RM41,168,876 and RM25,718,000.

Now, we have given much consideration of all Mr Abraham's arguments — written and oral. But at the end of the day, we are left unconvinced that G the learned judge was wrong in entering judgment for the respondents for damages to be assessed.

There is, we find, little difficulty in this area of the law. A plaintiff who proves a case of breach of trust or of fiduciary relationship is entitled to a wide range of relief. He may ask for and obtain an account of profits. H Or he may have a receiver appointed to recover money due to him. Or he may obtain damages. The appropriateness of the particular remedy depends very much upon the facts of each case. (See, eg, the orders made in *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209).

I It is quite true that the learned judge preferred the valuation tendered in evidence by the respondents and explained by their witness to that put in by the appellants' witness. But this is something that was well within the province of the learned judge. And there is nothing from the record

provided, or for that matter from the judgment, to show that the judge failed to undertake a judicial appreciation of the evidence. Indeed, all available material points to quite the opposite conclusion. We are therefore entirely satisfied that there are absent any good reasons for concluding that the judge was wrong in accepting the valuation evidence tendered by the respondents.

It is axiomatic that the statement of a view upon the value of a property — real or intangible — is really an expression of opinion. And it is open to the trier of fact in the justice system to accept the opinion of one witness upon the value of a thing in preference to the opinion of another.

In the present case, there is an added consideration. The appellants had not obtained any independent opinion upon the value of the RDB shares before entering into the share acquisition agreement. So, when it came to a challenge, there was no expert on their side who could come to justify the value Allied placed upon these shares. The justification they offered came from one of the appellants. He was an obviously interested witness. The judge rejected this evidence. He was well entitled to do so.

Even where the competing evidence is that of experts, a trial judge may properly choose between their evidence. The appellate approach in such a case was stated by Lord Diplock in *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43 at p 44 as follows:

> The appeal to the Federal Court under s 49 of the Land Acquisition Act 1960 is like any other civil appeal, by way of re-hearing. The Federal Court is entitled to review the inferences and conclusions of the High Court and to draw its own inferences and conclusions: *Aik Hoe & Co Ltd v Superintendent of Lands and Surveys* [1968] 2 MLJ 293. But where the inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, an appellate court ought to accept the High Court's findings of primary fact save in very exceptional cases. *Similarly where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's finding as to which he regarded as most reliable is entitled to considerable weight though it is less sacrosanct than his findings of pure fact which are dependent upon his view of whether or not particular witnesses were telling the truth.* Finally, their Lordships would observe that land valuation inevitably involves an element of appreciation and impression. There is room for divergence of opinion. *As in the case of appeals against assessments of damages or against apportionment of blame in actions for negligence an appellate court ought not to reject the judge's assessment and to embark upon a fresh valuation of its own unless it is satisfied for good reason that the judge's assessment must be wrong.* (Emphasis added.)

Granted that these observations were made in the context of a land acquisition case, we do not discern any difference in principle when the proposition comes to be applied to other cases concerning the valuation of property, whether movable or immovable.

Turning now to Mr Anantham's submissions, we must confess that when we first read the record and heard his submissions in support of

A Allied's appeal, we thought that the learned judge ought to have set aside the whole transaction in toto and not permitted the respondents to retain the club's premises with an adjustment in the price. However, having heard Raja Aziz in reply and having consulted the authorities cited by him, we have come to the conclusion that the learned judge was correct in
B granting the relief that he did.

The consequence of undue influence upon a contract is prescribed by s 19(1) of the Contracts Act 1950. That section is in the following terms:

> 19(1) When consent to an agreement is caused by coercion, fraud, or
C misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

The usual remedy by which an innocent party may relieve himself of all his obligations under a contract procured by undue influence is rescission. The circumstances in which that remedy may lie in cases of contract
D appear in s 34(1) of the Specific Relief Act 1950, which reads as follows:

> 34(1) Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:
>
> (a) where the contract is voidable or terminable by the plaintiff;
>
> E (b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff; and
>
> (c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the court has ordered him to pay.

F In *Hungerford Investment Trust Ltd v Haridas Mundhra & Ors* AIR 1972 SC 1826, the Supreme Court of India, when discussing the remedy of specific performance provided for in the parallel Indian legislation, made the following observation:

> G The question then is whether the application was maintainable under any other provision of the law. The Specific Relief Act 1963 is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act 'to define and amend the law relating to certain kinds of specific relief'. It does not purport to lay down the law relating to specific relief in all its ramifications. In *Ramdas Khatau and Co v*
> H *Atlas Mills Co Ltd* AIR 1931 Bom 151 it was held that the Specific Relief Act 1877 was not exhaustive. In *Rahmath Unnissa Begum v Shimoga Co-operative Bank Ltd* AIR 1951 Mys 59, the court said that the Specific Relief Act 1877 is founded on English equity jurisprudence and that it is permissible to refer to English law on the subject wherever the Act did not deal specifically with any topic (see also *Firm Kishore Chand Shiva Charan Lal v Budaun Electric*
> I *Supply Co Ltd* AIR 1944 All 66 at p 77). Although a matter on which the Act defines the law might generally be exhaustive, the Act as a whole cannot be considered as exhaustive of the whole branch of the law of specific performance.

In our judgment, much the same may be said of our Specific Relief Act, the preamble to which merely reads: 'An Act relating to specific relief'. It is noteworthy that nowhere in the Act is there a prohibition against the grant of some other kind of relief to a party who seeks to remedy a wrong perpetrated upon him by another in consequence of exerting undue influence in the wider sense that we have earlier discussed.

Cases may arise where to grant rescission may cause grave injustice. Yet the maxim of the law is *ubi jus ibi remedium*. If a wrong is found to have occurred in circumstances which disclose an abuse of confidence in respect of which a court of equity may grant relief, it is open to the court to grant such relief as would meet the ends of justice. This is the core of equity jurisprudence which was invented to mitigate the rigours of the common law. To demand, in the circumstances adumbrated a moment ago, that rescission be the sole remedy, albeit that its grant may cause as much, if not greater, harm than that inflicted by the wrongdoer, will denude equity jurisprudence — whether in point of right or remedy — of the very flexibility which the courts have strived to achieve in order to dispense justice according to the facts of a given case. The proposition that equity, in keeping with its flexibility, moulds the relief that ought to be granted in a particular case to meet the justice of that case is well supported by authority.

In *Gluckstein v Barnes* (1900) AC 240, the House of Lords rejected the identical argument as here advanced by Allied, Lord Macnaghten treating the point as being settled. He said (at p 249):

> The third ground of defence was that the only remedy was rescission. That defence, in the circumstances of the present case, seems to me to be as contrary to common sense as it is to authority. The point was settled more than 60 years ago by the decision in *Hichens v Congreve* (1831) 58 ER 157 and, so far as I know, that case has never been questioned.

Raja Aziz has also drawn our attention to *Dusik v Newton* (1985) 62 BCLR 1, a decision of the Court of Appeal of British Columbia. The joint judgment of the court contains much learning upon the subject of unconscionable bargains. On the flexibility of equitable remedies, particularly in the context of the remedy of rescission, we think it appropriate to reproduce the following passage from that judgment:

> Where rescission is impossible or inappropriate, it would be inequitable for the defendant to retain the benefits of the unconscionable bargain. As Dickson J (as he then was) stated in *Pettkus v Becker* [1980] 117 DLR (3d) 257 at p 273:
>
> > '*The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.*'
>
> In the instant case, it would be unjust to allow the board to employ technical arguments in order to preserve the fruits of its unconscionable actions. To echo the words of Davey JA in *Morrison v Coast Fin Ltd* [1965] 55 DLR (2d) 710 at p 716: 'I cannot believe that the law is so deficient that

A it cannot reach and remedy such a gross abuse of overwhelming inequality between the parties.

The ability of the court to award damages in cases such as the one at bar is bolstered by the view that a finding of unconscionability raises a presumption of fraud, although not 'fraud' as defined in *Derry v Peek*. Davey JA in *Morrison* at p 713, noted that proof of the requisite elements of
B unconscionable bargain 'creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable'; cf the rule formulated by McIntyre JA (as he then was) in *Harry v Kreutziger* [1978] 95 DLR (3d) 231 at p 237. In the face of a finding of constructive or equitable fraud, as demonstrated by proof of an unconscionable bargain, it cannot be argued that the court is foreclosed from providing a remedy.

C Prof Waddams, in *The Law of Damages* (1983) at p 601, makes the following comment:

> 'Practical impossibility of rescission can rationally be held to relieve the defendant from an actual order of rescission. There is no reason why it should relieve him from liability to pay the financial equivalent. The
D Court of Equity undoubtedly had good reason before the Judicature Act for its reluctance to award damages alone, for this would have had the appearance of trespassing on the jurisdiction of the common law courts. But no such reason can justify the refusal of the modern court to make use of the most appropriate money remedy.'

Waddams was speaking of remedies for innocent misrepresentation; he
E made the same comments in the context of unconscionable bargain in the *Law of Contracts* at p 406.

Canadian courts have begun to exercise the remedial flexibility recommended by Waddams. In *Treadwell v Martin* (1976) 67 DLR (3d) 493, a case involving undue influence, the Appeal Division of the New Brunswick Supreme Court held that an award of damages was appropriate:
F because of the interests of a third party (a mortgagee), 'an award of damages in the circumstances of the present case would be a more appropriate remedy than the setting aside of the deed' (per Hughes CJNB at p 504). In *Junkin v Junkin* (1978) 20 OR (2d) 118 (HC), the plaintiff's sale of his interest in a farm was found to be unconscionable. Because the farm had already been resold, Henry J ordered that part of the proceeds be paid out
G to the plaintiff. And in *Paris v Machnick* (1972) 32 DLR (3d) 723, another case where the court found the sale of a farm to be unconscionable, the Trial Division of the Nova Scotia Supreme Court acceded to the suggestions of counsel that 'an adjustment of the terms of sale would be preferable to its rescission' (at p 732). Hart J considered this the 'proper method of disposing of the matter' (at p 732).

H An award of damages in a case where rescission is unavailable also accords with general principles of unjust enrichment. In the words of Lord Wright (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 61, [1942] 2 All ER 122 at p 135 (HL)):

> 'It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit,
I that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep.'

In the case at bar, it is unjust that the board ought to benefit from an unconscionable bargain, and the court should provide a remedy.

Since the agreement between Dusik and the board has been found to be unconscionable, and since rescission is not available in the circumstances, it is open to this court to shape an appropriate remedy. The effect of rescission is to restore the plaintiff 'to the position he would have been in had the contract not been made' (Snell's *Principles of Equity* (28th Ed, 1982) at p 606). An award of damages in lieu of rescission must achieve the same result.

In *Hospital Products Ltd*, Mason J expressed a similar view. He said (at p 107):

> *The principle, accepted by the courts below, is that the fiduciary cannot be permitted to retain a profit or benefit which he has obtained by reason of his breach of fiduciary duty*: *Consul Development Pty Ltd v DPC Estate Pty Ltd* (1975) 132 CLR 373 at p 393; *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399 at p 401. A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty, or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position. (Emphasis added.)

Useful reference may also be made to the speech of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns (a firm) & Anor* [1995] 3 All ER 785.

Based on these authorities, Raja Aziz has argued that the purpose of equity is to ensure disgorgement by a wrongdoer who has profited through an abuse of confidence. That, in the present case, he argues, is achieved by getting Allied to return to the club, the difference between the fair price for the construction of the club's premises and the price charged and substantially collected by Allied. He says that this is precisely why the learned judge made those orders complained of by Allied.

We are of opinion that there is merit in the argument advanced by the respondents. As demonstrated earlier, both principle and authority lie in favour of the grant of relief that prevents unjust enrichment by Allied as a wrongdoer. In our judgment, no technical argument ought to be permitted to stand in the way of righting the wrong done to the respondents.

For the reasons we have thus far given, the arguments of Allied directed against the nature of the remedy fail.

That brings us to Mr Anantham's submission that the judge has permitted double recovery — the award of damages against the appellants in the first appeal and the judgment for repayment of the difference against Allied. Raja Aziz's argument in response is that there will be no double recovery in fact. This is because the respondents may obtain only nominal damages against the appellants if they recover the full sum awarded against Allied. Counsel also argues that it may be that the respondents will not recover anything from Allied. In that event, they will have to look to the appellants in the first appeal for satisfaction of the judgment.

A We think that there is much force in the arguments advanced by Raja Aziz. In cases like this, a court must always look at the practical consequences of any order it makes or of any relief that it grants. As a matter of practicality, the two awards are there not for double enforcement but for recovery of the actual loss suffered by the respondents. Pursuant to the control a court exercises over all its orders, there will no double B recovery.

The cross-appeal

We now come to the cross-appeal. It has been filed in Allied's appeal. It C arises from two orders the judge made.

First, the order for costs. Here, the judge awarded the respondents only the costs of the counterclaim. He did not give them the costs of Allied's action, although he had dismissed it. He did not say why he did this. The respondents say that they ought to have been awarded the costs of the action as well. We think that the point is well taken.

D The power to award costs is no doubt discretionary. But like other discretionary powers vested in a court, it must be exercised judicially. The general rule is that a successful litigant must have all his costs unless he has done something or omitted to do something in the conduct of the action by reason of which he should be deprived of his costs, either altogether or E partly. A judge when departing from the general rule must give reasons. No reasons have been given by the judge for not adhering to the general rule. This is, therefore, a case in which this court is entitled to exercise its original discretion. The respondents will therefore have the costs of the action as well.

F Second, the award of interest. The judge did award interest. But only from the date of judgment. The respondents say that he should have made interest run from at least the date of the writ. But Mr Yean, with his customary frankness, concedes that this is a matter of pure discretion. It is not that no interest was awarded. The judge was well entitled to determine the date from which interest should run. We do not see any merit in this G part of the cross-appeal. The order of the judge on interest shall stand.

The result

For the reasons given in this judgment, we make the following orders:

H (1) Civil Appeal No W–02–109–95 is hereby dismissed with costs. All orders made by the judge in the court below are affirmed. The deposit paid into court by the appellants shall be paid out to the respondents to account of their taxed costs.

(2) Civil Appeal No W–02–107–95 is hereby dismissed with costs. The I cross-appeal is allowed in part. The order of costs made by the judge is hereby varied to the extent that the respondents shall have the costs of the action as well. All other orders made by the judge are affirmed. The deposit paid into court by the appellant in this appeal

(Allied) shall be paid out to the respondents to account of their taxed costs. The respondents shall have half of the costs of their cross-appeal.

(3) The stay of execution granted in Civil Appeal No W–02–448–95 is hereby set aside. That appeal has otherwise been dealt with and no further orders in it are called for.

Order accordingly.

Reported by Isabel Liong